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No. 87-2104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LAKE NACIMIENTO RANCH CO.,
A California Limited Partnership,

Petitioner,

vs.

COUNTY OF SAN LUIS OBISPO, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When a land use ordinance is challenged as effecting a regulatory taking of property in violation of the Fifth Amendment, and uncontradicted declaration testimony shows that the uses theoretically permitted by the ordinance are not economically viable and thus that the ordinance destroys the property owners' reasonable, investment-backed, profit expectations:

   a. Does it violate decisions of this Court (*e.g., Keystone Bituminous Coal Assn. v. DeBenedictis* [1987] 480 US ___, 94 L Ed 2d 472, 495; *Williamson County Reg. Plan. Commn. v. Hamilton Bank* [1985] 473 US 172, 200; *Penn Central Transp. Co. v. City of New York* [1978] 438 US 104, 136) for the lower courts to refuse even to consider the effect of the ordinance on the property owners' reasonable, investment-backed, profit expectations?

   b. What does a property owner have to prove to establish a prima facie case that a land use regulation denies him economically viable use of his land?

   c. Is it a reasonable interpretation of this Court's decisions (*e.g., Williamson County*) to hold that a case can *never* be ripe for judicial examination until the property owner first applies to the land use regulator for permission to make a use which is known to be non viable?

2. In deciding *whether it would be futile to apply* to a land use regulator for either a development permit or a variance, is it this Court's intention that lower courts rigidly hold that such an issue can *never* be addressed by a court until *after* a property owner first *actually applies* for both a permit and a variance? If a property owner must *actually apply* for permits and variances in order *to prove the futility of making any applications*, does that eviscerate the futility doctrine (*i.e.*, the rule that it is not necessary to pursue paths of relief which can yield no relief in fact)?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a Writ of Certiorari issue to review a judgment and order of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

The Court of Appeals issued its first opinion (App A) on October 15, 1987. It was reported as *Lake Nacimiento Ranch Co. v. County of San Luis Obispo* (9th Cir 1987) 830 F 2d 977. An amended opinion (App B) was issued on March 8, 1988 (while the Petition for Rehearing was pending), and was reported under the same name at 841 F 2d 872 (9th Cir 1988). The District Court's opinion (App D) was not published.

JURISDICTION

This case involves a regulatory taking of a 1,500 acre parcel of undeveloped land. After the Petitioners (Property Owners) told the Respondent County that they intended to develop the property in accordance with the County's General Plan, and consistently with neighboring properties, the County amended its General Plan in a manner which left no economically viable uses for the property.

The Property Owners sought the assistance of the District Court (pursuant to 28 USC §§1331 and 1343) because of the unconstitutionality of this action, which took their property without just compensation, in violation of the Fifth and Fourteenth Amendments, and the inability of state law to provide relief.

The District Court's summary judgment in favor of the County was signed Oct. 21, 1985 and entered Oct. 24, 1985. (App D)

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[1] All parties are listed in the caption.

The Court of Appeal's judgment affirming the District Court was filed October 15, 1987 (App A), and amended March 8, 1988 (App B). The timely Petition for Rehearing was denied March 24, 1988. (App C)

This Court's jurisdiction is invoked pursuant to 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "Section 1 . . . . nor shall any State deprive any person of life, liberty, or property without due process of law; . . ."

Pertinent provisions of San Luis Obispo County ordinances are discussed in a County Planning Department memorandum, attached as App E.

STATEMENT OF THE CASE

Since 1964, the Property Owners have owned a 1,500 acre parcel of land (the Ranch property) on the south shore of Lake Nacimiento, an artificial lake created for recreational purposes in the northern part of San Luis Obispo County, California. Other properties bordering the lake have been developed (or are being developed) for recreational use, in accordance with the County's 1971 General Plan for the area.

In 1980, the County amended the Land Use Element of the General Plan by changing the Ranch property's use from "Recreation" to "Rural Lands," a designation which severely restricts what may be done on the land.

In 1981, the Property Owners applied for an amendment to the General Plan to return 800 of their 1,500 acres to

the "Recreation" category. At that time, the Property Owners submitted informal plans to the County to show the County the use which they intended to make of the 800 acres *if* the property were re-classified.[2]

The County, knowing what use the Property Owners intended to make (*i.e.*, one which was consistent with the "Recreation" category), refused to amend the General Plan.[3]

The County's General Plan and Land Use Ordinance (see App E) are typical of such land use control rules. They contain a "laundry list" of uses theoretically available in the "Rural Lands" category. However, during the litigation in the District Court the County planning staff narrowed that to five specific uses which it concluded *might* be economically viable. (App E)[4]

The complaint attacked the County's ordinances both on their face and as applied to the Ranch property.

When the County moved for summary judgment, it provided *no* evidence that there were any economically viable uses for the Ranch property under the "Rural Lands" category. In response, the Property Owners submitted affidavits from expert witnesses which showed

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[2] The Court of Appeals treated that informal submission as an attempt to determine permitted uses under the "Rural Lands" classification, in the court's effort to make it appear that an attack on the General Plan "as applied" to the property was not yet "ripe." (App B, p 10) This error was called to the Court of Appeals' attention in the Petition for Rehearing (as well as having been clearly discussed both in the briefs and at oral argument). Inexplicably, the opinion was not modified to reflect the actual facts.

[3] The Planning Commission had voted unanimously in favor of the amendment. The Board of Supervisors, however, by a 3-2 vote, rejected it.

[4] Curiously, the Court of Appeals' *original* opinion recites the County's identification of these five uses. (App A, p 11, fn 4) However, in its *amended* opinion, that reference is omitted. (The original fn. 4 became fn. 3, App B, p 12.) That omission made it easier for the Court of Appeals to make it appear that there were numerous supposed uses for the property.

that *none* of the five supposed uses could be developed in an economically viable manner on the Ranch property.

The District Court nonetheless entered summary judgment for the County.

The Court of Appeals affirmed, concluding that:

- the case was not "ripe" for adjudication because the Property Owners did not apply for any use in the "Rural Lands" category or seek a variance from it; and
- the impact on the Property Owners' profit expectations was irrelevant because the owners could fulfill those expectations by applying for a "Rural Lands" use.[5]

Both of these conclusions were reached in the context of a motion for summary judgment, and in contradiction of the evidence, *i.e.*, that there were *no* economically viable uses for the Ranch property under the "Rural Lands" category.

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[5] The Court of Appeals displayed confusion about the extent to which it was required to even consider the Property Owners' profit expectations. In its *original* opinion, the court held such consideration ". . . was specifically rejected for facial challenges to zoning restrictions. [Citing *William C. Haas v. San Francisco* (9th Cir 1979) 605 F 2d 1117.]" (App A, p 10) In their Petition for Rehearing, the Property Owners pointed out that *this* Court had used that test to examine the facial challenge in *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 US ___, 94 L Ed 2d 472, 497. Then, in its *amended* opinion, the Court of Appeals deleted the conclusion that examination of profit expectations was unwarranted and replaced it with the conclusion that examination of profit expectations was unnecessary because the Property Owners could pursue their expectations by applying for a "Rural Lands" use (App B, p 13), and commenting that there exists "some controversy" over such examination. (App B, p 13, fn. 4)

REASONS FOR GRANTING THE WRIT

INTRODUCTION

In its 1986-1987 Term, this Court decided a series of cases involving takings, and resolved some questions which had plagued land use regulators and property owners for years.

Important questions were left unanswered, however, and commentators from all points of the spectrum have observed the significance of the issues remaining undecided. Indeed, as Mr. Justice Stevens noted in his dissent in *Nollan v. California Coastal Commn.* (1987) 483 US ___, 97 L Ed 2d 677, 707, "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."

This case presents the opportunity to end the major elements of that uncertainty. Three issues, which appear in most cases now being litigated, are before the Court by this Petition:

- the extent to which a property owner's "reasonable, investment-backed profit expectations" are protected by the Just Compensation Clause from regulatory interferance;
- the nature of the proof which a property owner must submit to establish a *prima facie* case of regulatory taking; and
- the elements of the requirement that a regulatory taking be "ripe" before it is eligible for judicial review.

Lower state and Federal courts are in acute disharmony on how to decide these three issues, thus increasing the confusion among property owners and regulators about their respective duties and responsibilities. Litigation

abounds, without resolution on the merits and with contradictory results.

The situation in the lower courts is chaotic. Lack of "ripeness," for example, is now raised as a defense in virtually every regulatory taking case. As happened here, prodigous time, effort and money are expended in a chimerical effort to determine whether the case is "ripe" enough for the court to examine the merits. Because the outlines of "ripeness" have all the substance of a Will-o'-the-wisp, treatment of the issue is not consistent, even within the same Circuit. (Compare with this case, for example, the nearly contemporaneous decision of a different panel of the same Circuit Court of Appeals in *Herrington v. County of Sonoma* [9th Cir 1987] 834 F 2d 1488.)

This case presents the opportunity to explain to lower courts, property owners, and land use regulators the manner in which this Court wants the "taking" rules to operate. Such guidance would be a blessing to all concerned. At a minimum, it would lessen the burden on the judiciary by letting the participants in the land use process know precisely what needs to be done before the attention of the judiciary is available, as well as how a taking is to be proved.

BECAUSE OF THE SCANT AND CONFUSING GUIDANCE FROM THIS COURT'S DECISIONS, AND THE CONFLICTING WAY IN WHICH THOSE DECISIONS ARE BEING APPLIED BY LOWER STATE AND FEDERAL COURTS, THIS COURT'S ATTENTION IS NEEDED TO ESTABLISH A CLEAR RULE OF PARAMOUNT CONSTITUTIONAL LAW TO DETERMINE WHEN A LAND USE REGULATION'S INTERFERENCE WITH A PROPERTY OWNER'S

"REASONABLE, INVESTMENT-BACKED, PROFIT EXPECTATIONS" CONSTITUTES A TAKING UNDER THE FIFTH AMENDMENT'S JUST COMPENSATION CLAUSE

In its recent regulatory taking cases, this Court has indicated that a taking occurs if a regulation deprives a property owner of "economically viable use" of his land,[6] and that a property owner's "reasonable, investment-backed, profit expectations" are protected against confiscation by state and local government land use regulations.[7] The problem is that in no case has this Court made any effort to either define these terms or to give guidance to lower courts in determining their meaning. As one commentator summed it up:

> "In 1978, the Supreme Court, after 91 years of producing nearly all the leading police power taking decisions, essentially gave up. Viewing the facts of *Penn Central* . . . as presenting a question of police power takings, the Supreme Court announced that there was no 'set formula' to resolve the question. Rather, said the Court, different fact patterns require different approaches for solution." (Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash & Lee L Rev 1057, 1068 [1980]).

Thus, lower courts have generally sought to determine these issues by doing what judges and lawyers are most comfortable doing: examining the diminutions in value in

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6 *E.g., Agins v. City of Tiburon* (1980) 447 US 255, 260; *United States v. Riverside Bayview Homes, Inc.* (1985) 474 US 121, 126; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 US ___, 94 L Ed 2d 472, 488.

7 *E.g., Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 US 172; *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104.

earlier cases[8] which were held not to constitute a taking.

That creates another problem: the older cases were all decided *before* this Court announced either the concept of "economically viable use" or the concept of "reasonable, investment-backed, profit expectations,"[9] not to mention the rules announced or emphasized in *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 US ___, 96 L Ed 2d 250 and *Nollan v. California Coastal Commn.* (1987) 483 US ___, 97 L Ed 2d 677. Moreover, the decisions of this Court which appear in this earlier group were either decided at a significantly earlier and less complicated time in land economics and land use control sophistication, or were decided in the context of pleadings or proof which did not present the issue of whether the questioned regulation was confiscatory.

A

This Court's More Recent Decisions Have, in General, Expressed the Thought That a Property Owner's "Reasonable, Investment-Backed, Profit Expectations" Are Protected By the Fifth Amendment's Just Compensation Clause, Although Earlier Decisions Approved Regulations Which Effected Drastic Reductions in Property Value

Sixteen times in the last decade, this Court has noted that the question of whether a regulation effects a taking

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8 *E.g., Village of Euclid v. Ambler Realty Co.* (1926) 272 US 365; *Hadacheck v. Sebastian* (1915) 239 US 394; *William C. Haas Co. v. City of San Francisco* (9th Cir 1979) 605 F 2d 1117.

9 Neither concept appears in land use cases until this Court's 1978 decision in *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104, in which they were first enunciated.

of private property for public use must be analyzed in terms of the impact of the regulation on the property owner's "reasonable [or distinct] investment-backed expectations."[10] In three of those decisions which involved land use regulations, this Court considered the concept of profit or reasonable return on investment.[11]

However, in *none* of those cases, did this Court explain *how* the impact on a property owner's profit expectations was to be considered. It was simply said, and then left unelaborated. As a result, lower courts — as well as all participants in the land use process — have little guidance. While they know that, to be protected, the expectation must be more than a ". . . unilateral expectation or an abstract need . . ." (*Ruckelshaus v. Monsanto Co.* [1984] 467 US 986, 1005) and that the concept has its basis in ideas of ". . . justice and fairness . . ." (*Kirby Forest Indus., Inc. v. United States* [1984] 467 US 1, 14), this Court has given little more.

The Court has never attempted either to reconcile its general formulation of "reasonable, investment-backed expectations" with earlier cases emanating either from the Court itself or from influential lower courts, both state

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10 *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104; *Andrus v. Allard* (1979) 444 US 51; *Kaiser Aetna v. United States* (1979) 444 US 164; *PruneYard Shopping Center v. Robins* (1980) 447 US 74; *Hodel v. Virginia Surface Min. & Recl. Assn.* (1981) 452 US 264; *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419; *Kirby Forest Indus., Inc. v. United States* (1984) 467 US 1; *Ruckelshaus v. Monsanto Co.* (1984) 467 US 986; *United States v. Locke* (1985) 471 US 84; *Williamson County Reg. Plan. Commn. v. Hamilton Bank* (1985) 473 US 172; *United States v. Riverside Bayview Homes, Inc.* (1985) 474 US 121; *Connolly v. Pension Benefit Guaranty Corp.* (1986) 475 US 211; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 US 340; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 US ___, 94 L Ed 2d 472; *Hodel v. Irving* (1987) 481 US ___, 95 L Ed 2d 668; *Nollan v. California Coastal Commn.* (1987) 483 US ___, 97 L Ed 2d 677.

11 *Penn Central*, 438 US at 136; *Williamson County*, 473 US at 200; *Keystone*, 94 L Ed 2d at 495, 498.

and Federal, or to overrule any of the earlier cases. It is time for the Court to let the citizens of this country know whether it is serious about its protection against regulatory takings and, if so, how the protection is to be achieved by the victims.

For example, in *Village of Euclid v. Ambler Realty Co.* (1926) 272 US 365, the regulation diminished the value of the property by 75%. In *Hadacheck v. Sebastian* (1915) 239 US 394, the regulation diminished the value of the property by 88%. And in what may be the most eggregious example, the regulation in *William C. Haas Co. v. City of San Francisco* (9th Cir 1979) 605 F.2d 1117, diminished the value of the property by 95%. No taking was found in any of these cases. Each of these cases was decided *before* this Court's series of cases during the last decade introduced the "expectations" test. Nonetheless, each of the older cases is now cited by government counsel and by lower courts to demonstrate that regulations far more onerous than the one being litigated have been upheld.

But can these earlier cases be so routinely relied on to determine if there has been a taking? What light is shed on the older cases' validity by the more recent decisions of this Court? *Can* the older cases continue to be uncritically used as benchmarks for how far regulation may diminish property without compensation? How does leaving the property owner with 5% of the value of his land (or 12%, or even 25%) comport with "reasonable, investment-backed, profit expectations" or "economically viable use?" When that question is posed to a lay audience, the universal response is either groans or nervous laughter. Neither regulators nor property owners are able to predict with any degree of confidence the outcome in a specific case. Thus, numerous cases are litigated which might otherwise be resolved short of the

courthouse. Fundamental Constitutional protections deserve more identifiable road signs than that.

B

Because of Confusion Over the Weight to Accord This Court's General Statements, and How to Reconcile the Early Decisions With the More Recent Ones, the Decisions of Lower State and Federal Courts Are in Hopeless Conflict on Whether Even to Consider (Let Alone Protect) the "Reasonable, Investment-Backed, Profit Expectations" of Property Owners

Lacking meaningful guidance from this Court on the interpretation of "reasonable, or distinct, investment-backed profit expectations," lower courts have attempted, with varying degrees of success, to fill that void.

"Profit expectations" has been a particularly troublesome concept. The problem probably begins with semantics. Courts have traditionally not looked with favor on things identified merely as "expectations." Indeed, the term is often used derisively as connoting something less than a "right."[12] Some commentators routinely disparage those who invest in real estate as "speculators," implying that owners of real property are disfavored and less deserving of Constitutional protection than others.

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12 *See Deltona Corp. v. United States* (Ct. Cl. 1981) 657 F 2d 1184, 1193 ("no assurance that the permits would issue, but only an expectation"); *Graham v. Estuary Properties, Inc.* (Fla 1981) 399 So 2d 1374, 1383 (developer ". . . had only its own subjective expectation that the land could be developed in the manner it now proposes"); *Dean Tarry Corp. v. Friedlander* (2d Cir 1987) 826 F 2d 210, 213; *Yale Auto Parts v. Johnson* (2d Cir 1985) 758 F 2d 54, 59.

The *most* troublesome aspect of the concept, however, has been profitability. In *Penn Central*, the regulation was upheld because it permitted the property owner, ". . . not only to profit from the Terminal, but also to obtain a 'reasonable return' on its investment." (438 US at 136) In *Williamson County*, this Court spoke in terms of ". . . investment-backed profit expectations." (473 US at 200) And, in *Keystone*, this Court upheld the regulation because there was not even ". . . a single mine that could no longer be mined for profit . . ." (94 L Ed 2d at 495), there was no evidence that ". . . mining in any specific location . . . has been unprofitable . . ." (94 L Ed 2d at 495), and ". . . Petitioners may continue to mine coal profitably . . ." (94 L Ed 2d at 498)

Notwithstanding this Court's repeated employment of the "profit expectations" concept, however, lower courts are in conflict on whether even to accept the notion of profitability as a factor to consider in determining whether a taking has occurred. The Second Circuit and the Ninth Circuit have flagrantly flaunted their rejection of the idea,[13] while the Eighth Circuit, the Eleventh Circuit, the Federal Circuit, and the highest courts of New York, Washington, Arizona, and the District of Columbia have expressed a willingness to determine from the evidence whether the uses permitted by the regulation permit the owner to obtain a reasonable return.[14]

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13 *E.g., Park Avenue Tower Associates v. City of New York* (2d Cir. 1984) 746 F 2d 135; *William C. Haas Co. v. City of San Francisco* (9th Cir. 1979) 605 F 2d 1117; *MacLeod v. County of Santa Clara* (9th Cir. 1984) 749 F 2d 541.

14 *E.g., Florida Rock Indus., Inc. v. United States* (Fed Cir 1986) 791 F 2d 893; *Northern Westchester Professional Park Associates v. Town of Bedford* (1983) 60 N Y 2d 492, 458 NE 2d 809; *Orion Corp. v. State* (1987) 109 Wash 2d 621, 642 ("present, possible, and reasonably profitable use"); *Ranch 57 v. City of Yuma* (1986) 152 Ariz 218, 226-227, 731 P 2d 113 ("reasonable return on the property"); *Hornstein v. Barry* (D C App 1987) 530 A 2d 1177, 1185 ("reasonable financial return"); *Wheeler v. City of*

(continued)

In the case at bench, the Ninth Circuit Court of Appeals expressly questioned whether the concept had any place in this type of litigation at all, citing this Court's decisions in *Williamson County* and *Keystone* as the source of its uncertainty.[15]

This Court itself is thus an important, if inadvertant, source of the conflict and confusion. While the Court's "ad hoc" takings standard is theoretically workable, trial court judges have been trained, like the Light Brigade, "not to reason why." Turned loose with scant and confusing guidance, they latch onto outmoded, unrelated, or confusing precedents or they flounder — or some combination of the above.

A primary culprit in this confusion is *Andrus v. Allard* (1979) 444 US 51. *Andrus* was a personal property case, rather than a real property case. However, its principal impact seems to have been in the field of land use. *Andrus* involved the sale of bird parts and feathers which were protected by Federal statute and treaty. The statute did not require confiscation of the feathers, nor did it preclude their use. It did, however, prohibit their sale. In upholding the statute against a takings challenge, this Court expressed the now familiar litany that a property owner is not Constitutionally entitled to the *most* profitable use of his property, and that reduction in value, standing alone, is not sufficient to establish a taking. (444 US at 66) Property owners generally accept that

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(ftn. continued)
Pleasant Grove (11th Cir 1987) 833 F 2d 267, 271 ("... the landowner's loss takes the form of an injury to the property's potential for producing income or an expected profit"); *Nemmers v. City of Dubuque* (8th Cir 1985) 764 F 2d 502, 504-05 (reasonable return on the difference in value with and without the offending regulation).

15 "Some controversy exists concerning the appropriateness of considering a land owner's 'profit expectations' in determining on a facial challenge whether a regulation denies the land owner the 'economically viable use' of the owner's property." (App B, p 13, fn 4)

precept and, had the Court stopped there, there would have been no confusion. But the opinion went further. In a seemingly unnecessary portion of the opinion. written after the direct issue in the case had already been dealt with (*i.e.*, the existence of other viable uses had been shown),[16] the opinion continued:

> "At any rate, loss of future profits — unaccompanied by any physical property restriction — provides a slender reed upon which to rest a takings claim. Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." (444 US at 66)

Andrus has given fits to lower courts in land use cases ever since. It appears to be a continuing source of friction on this Court, as well. In the midst of the high profile takings cases decided last Term, the Court issued its decision in *Hodel v. Irving* (1987) 481 US ___, 95 L Ed 2d 668. While *Andrus* received scant mention in the majority opinion,[17] it was the subject of two Delphic concurring opinions, which are here reprinted side-by-side to illustrate a prime source of confusion for lower courts and litigants in attempting to conform to this Court's intentions. The opinion on the left was written by Justice Scalia, and concurred in by the Chief Justice and Justice Powell. The opinion on the right was written by Justice Brennan, and concurred in by Justices Marshall and Blackmun:

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16 *Compare* this Court's comments on the expansiveness of the "dicta" in *Pennsylvania Coal Co. v. Mahon* (1922) 260 US 393 in *Keystone*, 94 L Ed 2d at 487.

17 It is cited only once, and there cryptically. (*See* 95 L Ed 2d at 681.)

"... the present statute is indistinguishable from the statute that was at issue in Andrus v. Allard ... [O]ur decision [today] effectively limits Allard to its facts." (95 L Ed 2d at 681-682; Scalia, J., concurring)

"I find nothing in today's opinion that would limit Andrus v. Allard ... to its facts ... Accordingly I join the opinion of the Court." (95 L Ed 2d at 681; Brennan, J., concurring)

All of this might be limited to academic interest or, at worst, intramural disputation among the members of the Court. However, it is causing widespread distress in the dealings of property owners with regulators and with the litigation of this issue in the lower courts. All concerned need to know how the "profit" concept fits into the takings analysis. Should a substantial aspect of the Constitutional rights of property owners in land use regulation cases be made to depend on an uncertain dictum in a dispute over feathers?

This concept needs further judicial explication which is related to the real world of land use. It is Kafkaesque for property owners to listen to this Court opine that their "reasonable, investment-backed profit expectations" are protected against regulatory encroachment, and then watch as lower courts search for reasons to disregard the way in which the real property market functions or the way government land use regulations actually work, in order to deny relief. The message of *First English* and *Nollan*, while delivered in the context of small owners, is clear: the Constitutional protection accorded to the owners of private property must be enforced. The "expectations" factor is a key element in that enforcement.

BECAUSE OF THE *AD HOC* WAY IN WHICH THIS COURT HAS CREATED RULES TO DETERMINE WHEN A LAND USE CONTROVERSY IS SUFFICIENTLY "RIPE" FOR A COURT TO EXAMINE, AND THE CONFLICTING WAY IN WHICH THOSE RULES ARE BEING APPLIED BY LOWER STATE AND FEDERAL COURTS, THIS COURT'S ATTENTION IS NEEDED TO PROVIDE CLEAR GUIDANCE SO THAT PROPERTY OWNERS AND REGULATORS WILL KNOW HOW TO CONDUCT THEIR AFFAIRS, AND PRECIOUS JUDICIAL TIME WILL NOT BE SQUANDERED ON ISSUES OF "RIPENESS" RATHER THAN THE MERITS OF LEGITIMATE DISPUTES

"Ripeness" in land use litigation does not seem to be a concept whose full ramifications have been carefully considered by this Court. Rather, in the course of not deciding the compensation issue in cases which preceeded *First English* during the earlier part of this decade, this Court concluded that the facts of the cases before it were, for one reason or another, not sufficiently well-developed to form the basis for such a conclusion.

The rules were plainly developed in an *ad hoc* way, and seem intended to be applied in later cases in a similar *ad hoc* way, depending on the circumstances of those later cases.

However, as illustrated by the case at bench, some lower courts — feeling more comfortable applying rules mechanically — are treating this Court's *ad hoc* determinations as though they were carved on stone tablets and not to be varied. Because of the rapid proliferation of "ripeness" decisions in the lower courts, this Court's

guidance is needed to explain the flexible nature of the investigation required by the "ripeness" concept.

In other fields of law, for example, the Court has not discussed "ripeness" in the rigid manner which appears in the land use field. Rather, it has said that the concept must be applied in a ". . . pragmatic way . . ." (*Abbott Laboratories v. Gardner* [1967] 387 US 136, 149) For example, in *Columbia Broadcasting System v. United States* (1942) 316 US 407, a case involving an FCC rule which had not yet been applied to any broadcaster, the Court found a dispute which was ripe for decision:

> "Such regulations have the force of law *before* their sanctions are invoked as well as after. When, as here, they are promulgated by order of the Commission and the *expected* conformity to them causes injury cognizable by a court of equity, they are appropriately the subject of attack . . ." (316 US at 418-19; emphasis added.)

See also Maryland Casualty Co. v. Pacific Coal & Oil Co. (1941) 312 US 270, 273:

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

That description, setting aside municipal game-playing (*see San Diego Gas & Elec. Co.* 450 US at 655-656, fn. 22 [Brennan, J., dissenting] *Nollan*, 97 L Ed 2d at 692; *First English*, 96 L Ed 2d at 268), aptly describes most land use controversies which reach litigation.

A

Some Courts (Including the Court Below) Interpret this Court's *Ad Hoc* Rules in Such a

Rigid Fashion That a Property Owner Must Apply for Uses Which Are Theoretically Available, Even Though Undisputed Evidence Shows That the Property Cannot be Developed With Those Uses in an Economically Viable Manner

The rigidity with which the Ninth Circuit believed *this* Court *required* the "ripeness" rules in *Williamson County* and *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 US ___, 91 L Ed 2d 285 to be applied is express in the opinion:

> "To establish that the regulation has 'gone too far,' the Ranch *must* show that the County has made 'a final and authoritative determination of the type and intensity of development legally permitted on the subject property.' *MacDonald*, 106 S.Ct. at 2566. This final determination *requires* two decisions against the Ranch: a *rejected* development plan and the *denial* of a variance. *Williamson County* . . ." (App B, p 10; emphasis added.)

Thus, the Court below *categorically refused* to examine the facts on the *ad hoc* basis which this Court has repeatedly required. (*See, e.g., Kaiser Aetna v. US* [1979] 444 US 164, 175; *Penn Central*, 438 US at 124.) Instead, the opinion insists that *all* cases must be forced into an immutable template of first applying for a development permit and then applying for a variance before it will consider a case "ripe" for judicial review.

The problem is that the opinion below takes a test designed for the "ad hoc" factual examination of *Williamson County* and rotely applies it to *all* factual contexts. The inappropriateness of doing that at bench is twofold:

First. It makes no sense to submit a development plan under the "Rural Lands" classification. Either such a plan

would meet the requirements of that class or it would not. If it *did*, the plan would not be economically viable.[18] If it did *not*, then the County would *have* to deny it as not being consistent with the General Plan. To go through such an expensive,[19] time consuming process which has no hope of acceptance is futility at its most poignant. At a minimum, the futility of doing so presents a fact issue which is not capable of decision by summary judgment.

Second. The Ranch Co. *did* the functional equivalent of applying for a variance: it sought a zone change for the land it wanted to use. In conflict with the opinion below, *Herrington v. County of Sonoma* (9th Cir 1987) 834 F 2d 1488, 1496 concluded that, under California law, an amendment to the General Plan was the *only* action which could provide relief.

There is nothing in *Williamson County* which indicates that, when this Court employed the word "variance," this Court intended for that specific procedure to always be required, or that this Court intended the procedures suggested for the facts in *that* case to be carved in stone for *all* cases.[20] What is needed is "ad hoc" examination of what was done under the facts of *this* case. That, the opinion fails to do.

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18 Please recall that the evidence showed without contradiction that the uses permitted in that classification were so restrictive that they permitted no economically viable use. That, at least, should have precluded summary judgment.

19 It is not cheap to create land use plans — particularly for 800 acre tracts of land.

20 A variance procedure may have been appropriate in *Williamson County* because a variance might have been able to mitigate the *specific* objections which the regulating agency had to the *specific* project. Here, however, *no* specific project was proposed under the "Rural Lands" classification, because — as the evidence below confirmed — no economically viable project could be designed. Therefore, the Ranch Co. sought a rezoning, to change the land use classification on the 800 acres, so that a plan *could* be submitted.

In the same vein, the opinion criticises the Ranch Co. for submitting only an "*informal*" (App B, p 10; emphasis in the opinion) development proposal to the County. That was said not to be sufficient under *MacDonald*. (App B, p 10)

This analysis ignores *ad hoc* examination in favor of a rote attempt to plug circumstances into a formula designed for the facts of other cases.

Why was only an "informal" plan submitted? Because, under the existing "Rural Lands" classification, *no* plan would make economic sense. The "informal" plan was submitted to show the County the type of development the Ranch Co. would *like* to make *if* the 800 acres were re-zoned. The informal plan had *nothing* to do with trying to obtain a "final decision" about the uses permitted under the *existing* classification.

Thus, the legal standards employed in the opinion are not appropriate for this (or, necessarily, any other) case. What is needed is an *ad hoc* examination of the facts in this case on their own merits, with legal *precepts* from earlier cases providing a *context*, not a straight-jacket.

B

A Rigid Application of "Ripeness" Rules Conflicts With This Court's 1987 Decision in *First English*, Which Shows That a Use Application is Not a Prerequisite to "Ripeness" if No Viable Use is Available

Last Term, in *First English*, this Court demonstrated the flexibility intended for the "ripeness" concept which, in this case, the court below ignored. In *First English*, suit was filed one month after the regulation was adopted — without *any* application for a permit or variance — because the regulation permitted no economically viable use. The County attempted to have this Court dismiss the

appeal because of this supposedly "unripe" condition. This Court refused to do so, and dealt with the substantive issue presented.

Thus, where it is clear that the regulation denies all economically viable use — in contrast to situations like *Williamson County*, where the issue was the *type* of development, not whether there could be *any* reasonable development — *First English* indicates that a case is ripe for adjudication *without more*, because the regulator's final answer is certain.[21]

C

Some Courts (Including the Court Below) Have Rendered the Phrase "Meaningful Application" an Oxymoron by Requiring an Application in Order to "Ripen" a Conflict Even When the Uncontradicted Evidence Shows That No Economically Viable Use Can Be Made Under the Regulation, and Thus No Application Can be "Meaningful" in any Meaningful Sense of the Word

In *MacDonald, Sommer & Frates v. County of Yolo*, 477 US 340, 297 n. 8 (1986), this Court noted the state court's conclusion that, ". . . a *meaningful* application had not yet been made." (Emphasis added.) While this was not technically part of the Court's holding, its mention in the opinion has been treated by lower courts (including the court below) as having some purpose and they have attempted to apply the concept.

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[21] The *First English* approach seems especially pertinent in this case, where the Property Owners showed the County plans for the use they *would* make *if* the County changed the Ranch property's designation from "Rural Lands" to "Recreation." The County's rejection of the proposed General Plan amendment was a clear message from the County that any use more intense than those in the "Rural Lands" category (which, the evidence demonstrated, were not economically viable) would not be permitted.

But what is meant by a "meaningful" application? Logic would seem to suggest that such an application is one which presents a proposed use which is in conformity with local law and which satisfies the standards of the applicable planning and zoning ordinances *and* results in an economically viable use for the property. Without economically viable use, there is a taking. (*E.g., Agins v. City of Tiburon*, 447 US 255, 260 [1980].)

However, in three recent cases, the Ninth Circuit has seized upon the phrase "meaningful application" and so distorted it as to make it both meaningless and a bar to relief. How? They focus *solely* on the theoretically permitted uses, place the burden on the property owner of *disproving* the economic viability of everything on that laundry list, and then disregard evidence that the theoretically permitted uses are not economically viable. Or they create permit requirements where none exist under state law.

In both the case at bench and *Kinzli v. City of Santa Cruz* (9th Cir 1987) 818 F 2d 1449, the evidence showed that the uses available from the laundry list zoning ordinances contained *none* which could be developed in an economically viable manner. In *Shelter Creek Dev. Corp. v. City of Oxnard* (9th Cir 1988) 838 F 2d 375, the state Supreme Court had previously decreed that no application was required at all. Nonetheless, the Ninth Circuit held each case to be insufficiently "ripe" for adjudication because of the absence of a "meaningful" application.

With respect, those holdings make no sense. If no viable use can be made under the existing zoning, how can it be said that the property owner forewent the opportunity to make a "meaningful" application? Such applications would not be "meaningful" in any sense of the word. Had applications been made *and granted*, the projects could not have been developed, as they would not be economically viable.

If this Court meant anything by its use of the phrase "meaningful application" in *MacDonald*, it cannot be what the opinion below interprets it to mean. The opinion below has alchemized the phrase into a relief denying oxymoron, in sharp conflict with, *e.g., Herrington v. County of Sonoma* (9th Cir 1987) 834 F 2d 1448, 1496, which concludes that there is no requirement to apply for permission to develop a project which the General Plan does not permit.

BECAUSE THIS COURT HAS YET TO DEAL WITH THE QUESTION OF WHAT FACTS SUFFICE TO RENDER IT FUTILE TO MAKE A LAND USE APPLICATION BEFORE FILING SUIT ALLEGING A REGULATORY TAKING, AND LOWER STATE AND FEDERAL COURTS HAVE REACHED CONFLICTING DECISIONS ON HOW ONE MUST PROVE FUTILITY, THIS COURT'S GUIDANCE IS NEEDED IN ORDER TO MAKE LAND USE LITIGATION RATIONAL

Plainly, there are some actions which it is futile even to attempt to carry out, because their outcome is known in advance to be adverse. As one perceptive court put it, to undertake such actions would be the legal equivalent of requiring one ". . . to pump oil from a dry hole." (*Ogo Associates v. City of Torrance* [1974] 37 Cal App 3d 830, 834, 112 Cal Rptr 761, 763)

The word "futile" has a plain meaning. Webster's defines it as "serving no useful purpose" and "completely ineffective." (Webster's New Collegiate Dictionary 468 [1974]) A leading land use text concludes that application to a regulatory body must be considered futile if any of the following circumstances applies: the agency has no power to grant relief; the agency lacks the power to grant

relief which would permit the proposed project to be developed; the community is openly hostile to the property owner's proposal; the regulatory agency is openly hostile either toward the property owner, his proposal, or the type of development proposed; or the regulation was adopted to preclude the type of development the owner wishes to make. (3 Rathkopf, *The Law of Zoning and Planning* §35.02)

The idea behind the futility exception to the need to approach local regulators and seek their administrative aid is that seeking such aid would be an idle act.[22]

Thus, while this Court might expect lower courts to combine the pragmatic aspects of the futility doctrine with the *ad hoc* investigative aspects of the taking doctrine and come up with a flexible solution, it will be disappointed. In land use disputes, as the opinion below demonstrates, the lower courts continue to fail in their duty to follow this Court.

A

This Court's Decisions Have Dealt With the Futility Issue Only Vaguely, Noting That Property Owners Need Not Resort to "Piecemeal" Litigation Nor be Subjected to "Unfair" Procedures

This Court has not directly addressed the futility issue.

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[22] In fields other than land use, this Court has had no trouble recognizing futility and excusing parties from engaging in it as a prelude to litigation. (*See, e.g., Glover v. St. Louis-San Francisco Ry. Co.* [1969] 393 US 324, 330-331 [discrimination by labor union against its members]; *Houghton v. Shafer* [1968] 392 US 639, 640 [denying law book use to prison inmate]; *King v. Smith* [1968] 392 US 309, 312, fn. 4 [denial of AFDC benefits].) In each case, there was an available administrative avenue which, if pursued, theoretically could have yielded the relief sought. This Court lost no time in explaining that there was no requirement to seek theoretically available, but pragmatically futile, relief before filing suit.

However, some extended discussion appears in Justice White's dissenting opinion in *MacDonald*. Because four Justices signed that opinion, and the majority opinion found it elementary that "[a] property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this [final] decision" (91 L Ed 2d at 295, fn. 7), Justice White's analysis seems to have more than the importance usually attibuted to dissents, and is reprinted here verbatim:

> "Nothing in our cases, however, suggests that the decisionmaker's definitive position may be determined only from explicit denials of property owner applications for development. Nor do these cases suggest that repeated applications and denials are necessary to pinpoint that position.
>
> "Moreover, I see no reason for importing such a requirement into the 'final decision' analysis. A decisionmaker's definitive position may sometimes be determined by factors other than its actual decision on the issue in question. . . . Although a landowner must pursue reasonably available avenues that might allow relief, it need not, I believe, take patently fruitless measures." (*MacDonald*, 91 L Ed 2d at 301; White, J., dissenting.)

The opinion below is utterly at odds with this philosophy.

The opinion below *requires* applications in *all* cases, even when the uncontradicted evidence shows that an application which *complies* with the General Plan *cannot* be economically viable, and a plan which *is* economically viable (and thus does *not* conform to the General Plan) *cannot* be approved. It also *requires* an application for a "variance" (borrowing the term from *Williamson County* and applying it here by rote), even though — as a matter

of state law — no variance *could* be granted which would conflict with the General Plan. (*Compare Herrington v. County of Sonoma* [9th Cir 1987] 834 F 2d 1488, 1496, in which a different panel of Ninth Circuit Judges correctly analyzed California law and concluded that a variance conflicting with the General Plan can not be granted.)

Moreover, in a triumph of form over substance, the opinion disregards the fact that the Property Owners *did* apply for an amendment to the General Plan. That action was the functional equivalent of seeking a "variance" because, if granted, it would have permitted economically viable use. (*Compare Herrington*, 834 F 2d at 1496, in which a different panel of Ninth Circuit Judges analyzed California law and concluded that an amendment to the General Plan was the *only* action which could provide relief.)

B

The Lower Courts Are Divided on How to Approach the Futility Issue, Some Permitting Proof That Application *Would be* Futile, Others (Including the Court Below) Requiring Actual Application and Rejection as Prerequisites to Proving That the Application Process Itself is Futile Even to Attempt

Justice White's *MacDonald* opinion also addressed the method of proving futility: "I emphasize that the futility of further application would have to be *proven at trial* for appellant to prevail here on the merits." (*MacDonald*, 91 L Ed 2d at 301, fn. 2; White, J., dissenting; emphasis added.)

The opinion below mocks this teaching and makes a joke of this Court's search for definitive answers in *Williamson County*. Building on the same court's recent decision in *Kinzli v. City of Santa Cruz* (9th Cir 1987) 818 F 2d 1449, 1454, the Ninth Circuit concluded that, in

order to satisfy what it interpreted as the *Williamson County* "ripeness" test, proof of *futility* — *i.e.*, proof that it made no earthly sense even to bother applying for anything — required *first* an application for a permit, *and then* an application for a variance, *and only then* would the Court consider whether submission of *any* application in the first place would have been futile. (App B, p 11)[23]

One's mind reels. What is the purpose of this charade? Any definition of "futility" must mean that evidence ought to be admissible to demonstrate the pointlessness of *seeking* relief from the regulator. To require that the property owner *actually make* applications in order to demonstrate that it would have been futile to make any applications renders the futility concept meaningless.

Did this Court intend for *Williamson County* to require this sort of abject silliness, or mightn't clarification assist the administration of justice?

WHAT DOES A PROPERTY OWNER HAVE TO DO TO *PROVE* THAT A LAND USE REGULATION LEAVES *NO* ECONOMICALLY VIABLE USE?

Twelve times in the last decade, this Court has noted that, if a regulation deprives a property owner of the "economically viable use" of his property, a taking has occurred.[24]

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[23] This conflicts sharply with *Herrington*, for example, in which the court permitted *trial* of the issue of futility and held that development applications which complied with the General Plan, as well as variances which would conflict with the General Plan, would have been futile to seek. (834 F 2d at 1496)

[24] *Kirby Forest Indus., Inc. v. United States* (1984) 467 US 1, 14; *Agins v. City of Tiburon* (1980) 447 US 255, 260; *Penn Central Transp. Co. v. City of New York* (1978) 438 US 104, 124; *Kaiser Aetna v. United States* (1979) 444 US 164, 174 n. 8; *San Diego Gas & Elec. Co. v. City of San Diego* (1981) 450 US 621, 653 (dissenting opinion); *MacDonald, Sommer*

(continued)

However, in *none* of those cases did the Court explain how to determine economic viability. As was the case with "reasonable, investment-backed profit expectations," the phrase was simply stated and then lower courts were left to shift for themselves. The absence of guidance was at the heart of the decision in this case:

> ". . . the precise meaning of 'economically viable use' of land is elusive and has not been clarified by the Supreme Court." (App B, p 12)

As a result, confusion reigns.

This case is a paradigm. As the opinion below notes, the regulation at bench ". . . outlines 8 groups of allowed uses and 42 groups of special uses . . ." for the Ranch property. (App B, p 6) During the litigation, however, the County's staff concluded that only 5 from this welter of theoretical uses "might" be developed on the Ranch property in an economically viable manner (though the County had made no studies to determine that to be true). (*See* App E.)

The Property Owners hired expert consultants to evaluate each of the five identified uses. Their testimony (which was not countered by any County testimony) established that *none* of the identified uses could be developed on the Ranch property in an economically viable manner.

Nonetheless, both the District Court and the Court of Appeals cast about in a strained effort to find some theoretically available use which had not been examined

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(ftn. continued)
& Frates v. County of Yolo (1986) 477 US __, 91 L Ed 2d 285; *Nollan v. California Coastal Commn.* (1987) 483 US __, 97 L Ed 2d 677; *Keystone Bituminous Coal Assn. v. DeBenidictis* (1987) 480 US __, 94 L Ed 2d 472; *United States v. Riverside Bayview Homes* (1985) 474 US 121; *Williamson County Regional Planning Commn. v. Hamilton Bank* (1985) 473 US 172; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (1981) 452 US 264; *Schad v. Borough of Mount Ephraim* (1981) 452 US 61.

by the Property Owners' experts, in order to support a conclusion that there was some use which *might* (the courts couldn't know, because there was no testimony and the summary judgment precluded trial) yield an economically viable use, even though the only evidence in the record showed no economically viable uses were available under the stringent General Plan.

What's an owner got to do? To require a property owner to run this sort of procedural gauntlet as a prerequisite *not* to recovery, but merely to getting his case to trial, mocks the Just Compensation Clause.

If this Court was serious last Term in *First English* and *Nollan*, that the rights of property owners are to be protected by the judiciary against the ". . . cleverness and imagination . . ." of governmental word games (*Nollan*, 97 L Ed 2d at 692), even if that ". . . lessen[s] to some extent the freedom and flexibility of land use planners and governing bodies of municipal corporations . . ." (*First English*, 96 L Ed 2d at 268), then this type of summary judgment gamesmanship must end.[25]

Last Term, this Court created a meaningful remedy for regulatory takings. However, if there is no way to get a regulatory taking case to trial, the remedy is unavailable. If this Court is serious about Constitutional protection for private property owners, further explication is needed. Your message is not being heeded by the lower courts.

CONCLUSION

Land use practitioners are grateful for this Court's recent efforts to clarify some of the basic precepts of

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25 Surely, even under this Court's decision in *Celotex Corp. v. Catrett* (1986) 477 US 317, a land use regulator faced with expert testimony (as here) which shows the absence of any economically viable use has *some* duty to come forward with *evidence* to counter that testimony in order to support a summary judgment.

regulatory taking law. However, major questions — which are occupying significant portions of the time of lower state and federal courts — need to be answered before property owners receive protection.

This case presents the fundamental issues: the meaning of "economically viable use" and "reasonable, investment-backed profit expectations," and the scope of the "ripeness" doctrine. These issues routinely arise in regulatory taking cases.

Aside from their general importance, however, the conflicting decisions being rendered by lower state and federal courts cry out for this Court's intervention. Particularly in light of this Court's apparent desire to have most land use cases tried in state courts, clear guidance on how to analyze these Federal Constitutional issues seems mandatory. State courts remain frustrated, as the recent comment by the Supreme Court of Washington attests:

> "Despite these attempts [*i.e.*, *First English*, *Nollan*, and *Keystone*], the definitive answers, so necessary for state courts to make reasoned determinations concerning minimum federal due process requirements, remain unavailable. Our task is complicated further by the ambiguities contained in recent Supreme Court decisions and by the fact that despite a 3-month separation, recent cases do not cite each other. As Justice Stevens observed, '[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of [federal regulatory] takings jurisprudence.'" (*Orion Corp. v. State* [1987] 109 Wash. 2d 621, 653)

Petitioners pray that Certiorari be granted.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAKE NACIMIENTO RANCH CO., *Plaintiff-Appellant,* v. COUNTY OF SAN LUIS OBISPO, *Defendant-Appellee.*	No. 85-6475 D.C. No. CV-82-2932-CBM OPINION

Argued and Submitted
September 9, 1987—Pasadena, California

Filed October 15, 1987

Before: Cynthia Holcomb Hall, John T. Noonan, Jr. and David R. Thompson, Circuit Judges.

Opinion by Judge Hall

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, District Judge, Presiding

SUMMARY

Land Use and Zoning/Constitutional Law/Public Employees

Appeal from judgment. Affirmed.

Appellee County amended its Land Use Element and Land Use Ordinance reducing the allowed residential densities and reclassifying most of the remaining privately-owned, under-

veloped land around Lake Nacimiento from a Recreation zone to a more restrictive Rural Lands zone. The property at issue is owned by appellant Ranch and borders the lake. The amendments to the County's General Plan changed the land use designation for almost all of the Ranch's property from Recreation to Rural. The Ranch applied for an amendment to the General Plan requesting redesignation of some to its property to Recreation. The County Planning Commission recommended the request, the County Board of Supervisors denied. One of the supervisors voting against the amendment, Mankins, was a member of the Cal-Shasta Club, owning property contiguous to the Ranch's property. The Club opposed the Ranch's application for an amendment. Mankins had some interests in the common realty of the Club and failed to disclose his membership and interests as required. The Ranch sued. It claims that the County's General Plan and Land Use Ordinance so restrict the Ranch's ability to develop its property that it accomplishes an unconstitutional taking. It also claims that under 42 U.S.C. § 1983, California law, and the United States Constitution it was denied its fourteenth amendment right to due process because Supervisor Mankins voted against the Ranch's proposed amendment despite his alleged, undisclosed conflict of interest. The district court granted the County's motion for summary judgment as to the Ranch's taking cause of action and due process cause of action.

[1] The district court viewed the evidence in the light most favorable to the Ranch as the nonmoving party. **[2]** The district court properly required the Ranch to make sufficient showings supporting the essential elements of its case whenever the Ranch would have carried the burden of proof at trial. **[3]** In order for an "as applied" regulatory taking claim to be ripe, a plaintiff must establish two components. **[4]** The County's response to the Ranch's informal development proposal request shows that it viewed the proposal as tentative, the denial was not final and authoritative, **[5]** and it cannot meet its burden of showing futility. **[6]** The County's zoning

restriction is facially invalid if it meets two tests. The ordinance meets the first test. [7] Under the second test, [8] the fact that a development restriction prevents an owner from recovering its initial investment or a favorable return on its investment does not mean that that restriction is constitutionally defective. [9] The test for whether a development restriction denies the Ranch the economically viable use of its property focuses on the existence of permissible uses. [10] The Ranch has failed to make a sufficient showing that there was no available beneficial use. [11] The Ranch failed to present any evidence showing that the County had a policy of allowing financially interested officials to participate in decision-making. [12] The district court correctly held that *Parratt* required the Ranch to first seek compensation, available under California law, before it could bring an action for deprivation of its right to procedural due process. [13] The question of whether plaintiff may bring a direct cause of action under the fourteenth amendment has been left unanswered by the Supreme Court and this court need not decide this issue.

COUNSEL

Michael M. Berger and M. Reed Hunter, Los Angeles, California, for the plaintiff-appellant.

Vicki E. Land and Thomas F. Winfield, III, Los Angeles, California, for the defendant-appellee.

OPINION

HALL, Circuit Judge:

Plaintiff, Lake Nacimiento Ranch Company (Ranch) brought this action against the County of San Luis Obispo

(County), alleging that the County's restrictions on its property accomplished an unconstitutional taking. The Ranch also claims that the County Board of Supervisors violated its right to due process because one of the voting supervisors had a conflict of interest. The district court granted summary judgment in favor of the County, which the Ranch now appeals. The district court also denied the County's request for attorneys' fees, which the County appeals.

I. *Overview*

Lake Nacimiento is an artificial reservoir created in 1960 and located in northern San Luis Obispo County. As required by California law, the County has a comprehensive long-term General Plan for development, which includes a Land Use Element. *See* Cal. Gov't Code § 65302 (West 1983). The Land Use Element describes the County's official policy on the location, growth and development of land uses. *Id.* § 65302(a). The County also has a zoning ordinance, called the Land Use Ordinance, which states the County's development standards and review procedures.

The County adopted the Nacimiento/San Antonio General Plan in 1971. In 1980, the County amended the Land Use Element and the Land Use Ordinance, reducing the allowed residential densities and reclassifying most of the remaining privately-owned, undeveloped land around the lake from a "Recreation" zone to a more restrictive "Rural Lands" zone. The Rural Lands category, like the Recreation category, expressly permits single-family residences and light agricultural uses. In fact, the Rural Lands category outlines 8 groups of allowed uses and 42 groups of special uses.

The property which is the subject of this action is owned by the Ranch and comprises approximately 1,500 acres bordering the south shore of Lake Nacimiento. The Ranch acquired the property in 1964.[1] Since that time, the property has been

[1]The property was acquired as part of a 3,000 acre parcel. The Ranch paid about $1 million for the entire parcel. Part of the parcel has been sold.

held for investment and leased in the interim for cattle and horse grazing and for equestrian purposes. The 1980 amendments to the County's General Plan changed the land use designation for almost all of the Ranch's property from Recreation to Rural Lands.

In 1981, the Ranch applied for an amendment to the General Plan, requesting the redesignation of 800 acres of the property as a Recreation zone. On November 19, 1981, the County Planning Commission unanimously recommended the adoption of the requested amendment. On December 14, 1981, the County Board of Supervisors voted 3-2 to deny the Ranch's proposed amendment.

One of the supervisors voting against the amendment, Howard Mankins, was a member of the Cal-Shasta Club, a private, non-profit recreational organization owning property contiguous to the Ranch's property. The Cal-Shasta Club openly opposed the Ranch's application for an amendment. Had the amendment been enacted, more people would have had access to lake-shore properties for recreational purposes, thereby diluting the degree of exclusive use enjoyed by club members. The Ranch claims that Mankins owns a cabin, a boat dock, and has an interest in the common realty of the Cal-Shasta Club. Mankins did not disclose his membership in the Cal-Shasta Club or these alleged interests at the December 14 hearing or in the financial interest statements required by California law. *See* Cal. Gov't Code §§ 87100-03 (West 1987).

On June 11, 1982, the Ranch initiated this action against the County. The Ranch alleges two causes of action. First, the Ranch claims that the County's General Plan and its Land Use Ordinance so restrict the Ranch's ability to develop its property that they accomplish an unconstitutional taking of the property in violation of the fifth and fourteenth amendments. The Ranch requests orders invalidating, and enjoining the County from enforcing, the 1980 amendments as they apply to the Ranch. It also requests damages under 42 U.S.C.

§ 1983 for the taking. Second, the Ranch claims that under 42 U.S.C. § 1983, California law, and the United States Constitution it was denied its fourteenth amendment right to due process because Supervisor Mankins voted against the Ranch's proposed amendment despite his alleged, undisclosed conflict of interest. Pursuant to this cause of action, the Ranch requests damages and one of the following: either the invalidation of the vote of the Board of Supervisors and the sustaining of the Planning Commission's recommendation approving the amendment, or the invalidation of the 1981 decision changing the land use designation to Rural Lands.

The district court, in its unpublished opinion, granted the County's motion for summary judgment as to the Ranch's taking cause of action. Both parties moved for summary judgment as to the due process cause of action, and the district court granted the County's motion. The Ranch now appeals these decisions. The County also appeals from the district court's denial of its motion for attorneys' fees under 42 U.S.C. § 1988.

II. *The Ranch's Taking Claim*

On appeal, the Ranch argues that the district court erred in granting the County's summary judgment motion on the taking claim. We review the district court's grant of the County's summary judgment motion de novo. *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 464 U.S. 874 (1983). We must determine, viewing all evidence and factual inferences in the light most favorable to the Ranch, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

A. *Standards For a Motion for Summary Judgment*

[1] The Ranch claims that the district court failed to view the evidence in the light most favorable to the Ranch as the

nonmoving party. The district court is obliged to apply this standard in considering a summary judgment motion. *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1328-29 (9th Cir. 1983), a nd it apparently did so. Throughout its opinion, the district court accepted the Ranch's version of the material facts, unless the Ranch failed to submit evidence supporting its version. Therefore, the district court applied the correct standard in viewing the facts.

The Ranch also claims that the district court erroneously placed the burden of proof on the Ranch, and not on the County. The Ranch misunderstands its own burden of proof, which has been clarified by the Supreme Court's recent decision. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

[2] Under *Celotex*, the Ranch, as the nonmoving party, may avoid summary judgment against it only by making "a showing sufficient to establish the existence of an element essential to [its] case, and on which [the Ranch] will bear the burden of proof." 106 S. Ct. at 2552-53. In contrast, the County, as the party seeking summary judgment, "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 2553. The County was not required to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (emphasis in original). The district court properly required the Ranch to make "sufficient showings" supporting the essential elements of its case whenever the Ranch would have carried the burden of proof at trial.

B. *The Ranch's "As Applied" Challenge*

The Ranch claims that the district court failed to address its claim that the General Plan, the Land Use Ordinance, and the Board of Supervisors' denial of the amendment "as

applied" to its property accomplished an unconstitutional taking. The Ranch argues that the district court only addressed its "facial" challenge to these County actions. This is not the case. The district court decided that the Ranch's "as applied" taking claim was not ripe for consideration. We review de novo the district court's ruling that the Ranch's claim was not ripe. *Assiniboine and Sioux Tribes v. Board of Oil and Gas,* 792 F.2d 782, 787 (9th Cir. 1986).

[3] In order for an "as applied" regulatory taking claim to be ripe, a plaintiff must establish two components: (1) that the regulation has gone so far that it has "taken" plaintiff's property; and (2) that any compensation tendered for such taking is not "just." *MacDonald, Sommer & Frates v. Yolo County,* 106 S. Ct. 2561, 2566 (1986); *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, 1453, *modified* 87 Daily Journal D.A.R. 5058 (9th Cir.) (filed June 4, 1987, amended August 7, 1987). To establish that the regulation has "gone too far," the Ranch must show that the County has made "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald,* 106 S. Ct. at 2566. This final determination requires two decisions against the Ranch: a rejected development plan and the denial of a variance. *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 187-88 (1985); *Kinzli,* 818 F.2d at 1454.

[4] The Ranch admits that it has submitted to the County only an *informal* development proposal for a private membership recreational vehicle club in conjunction with its request for an amendment to the Land Use Ordinance. The County's response to the informal request shows that it viewed the proposal as "tentative." The County's response specified the numerous deficiencies in the informal proposal and suggested ways to remedy them. In light of these facts, the County's denial of this informal request is not a final and authoritative decision exposing the nature and extent of per-

missible development under the Rural Lands classification. *See MacDonald*, 106 S. Ct. at 2567-69.

[5] The Ranch correctly argues that it can avoid the ripeness requirement of a final determination if it can show that the submission of a development plan and an application for a variance would be futile. *American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981). The Ranch has the "heavy burden" of showing futility. *Id.* The Ranch cannot, at this point, meet this burden. As explained in *Kinzli*, "*at least one* meaningful application" for a development project must be made. *Kinzli*, 818 F.2d at 1454-55 (emphasis in original). In addition, the Ranch must have also made a meaningful application for a variance under the zoning ordinance. *Id.* at 1455 n.6. Since the Ranch has failed to submit such applications, it may not argue that it would be futile to secure a final determination from the County.[2]

C. *The Ranch's Facial Challenge*

As the district court properly recognized, the Ranch may challenge the zoning restriction on the basis that the "mere enactment" of the restriction constitutes a taking of its property. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Martino*, 703 F.2d at 1146 n.2. The Ranch, however, faces an "uphill battle in making a facial attack on the [zoning restriction] as a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1247 (1987). The district court, therefore, properly placed the burden of proof on the Ranch.

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[2]The recent Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987), is consistent with the Supreme Court's previous rulings dealing with ripeness. In *First English Evangelical*, the Court held that the taking claim was ripe because the state court below had assumed that a taking had occurred. *Id.* at 2384. The Court thereby distinguished its rulings in *MacDonald* and in *Agins*. *Id. See also Kinzli* at n.7 (as modified).

[6] The County's zoning restriction is facially invalid if: (1) it does not substantially advance legitimate state interests, or (2) it denies an owner economically viable use of his land. *Agins,* 447 U.S. at 260; *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 295-96 (1981). The County's ordinance meets the first test, *see Cormier v. County of San Luis Obispo,* 161 Cal. App. 3d 850, 207 Cal. Rptr. 880 (1984), and the Ranch does not argue otherwise.

[7] Under the second test, the precise meaning of "economically viable use" of land is elusive and has not been clarified by the Supreme Court. *MacLeod v. County of Santa Clara,* 749 F.2d 541, 548 (9th Cir. 1984), *cert. denied,* 472 U.S. 1009 (1985). The Ranch argues that "economically viable use" of property means use which allows the owner to earn a reasonable return on his investment. The Ranch essentially argues that the County's regulation deprives it of the economically viable use of the property because it may not recoup its "profit expectation."

[8] This test for "economically viable use" was specifically rejected for facial challenges to zoning restrictions. In *William C. Haas v. City and County of San Francisco,* 605 F.2d 1117 (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1980), this court explained that in facial challenges, the fact that a development restriction prevents an owner from recovering its initial investment or a favorable return on its investment does not mean that that restriction is constitutionally defective. *Id.* at 1121. "[D]isappointed expectations in that regard cannot be turned into a taking. . . ." *Id.* This principle was affirmed in *Hamilton Bank*; the question of whether a regulation interferes with one's reasonable investment-backed expectations may only be answered in the context of an "as applied" challenge. 473 U.S. at 190-91 & n.12.[3]

[3]A close look at the cases adopting the "reasonable investment-backed expectation" test shows that this test only was relevant to "as applied" challenges. *See Penn Central Transportation Co. v. New York City,* 438 U.S.

[9] Under *Agins* and *Hodel*, the test for whether a development restriction denies the Ranch the economically viable use of its property focuses on the existence of permissible uses. *Agins*, 447 U.S. at 262; *Hodel*, 452 U.S. at 296; *Haas*, 605 F.2d at 1120-21. The Ranch bears the ultimate burden of proof in showing that the restriction, on its face, denies beneficial uses. *See Keystone*, 107 S. Ct. at 1247 (plaintiffs face an uphill burden in making a facial attack); *Hodel*, 452 U.S. at 296-97 (Court scrutinized the restriction's language, yet did not require the governmental entity to prove the availability of beneficial uses); *Agins*, 447 U.S. at 262 (same).

[10] The district court found that the Ranch had failed to make a sufficient showing that there was no available beneficial use under the General Plan and Land Use Ordinance.[4] Specifically, the district court held that the Ranch failed to submit any evidence showing that a dude ranch in combination with other uses (other than a working ranch) was not economically viable. Moreover, the availability of both a variance under Land Use Ordinance § 22.01.044 and of additional special uses under § 22.08.120 strongly suggests that there are other economically beneficial uses not expressly included. This fact alone logically prevents the ordinance from being overrestrictive on its face, since the Ranch could apply for a variance or waiver of the restrictions.

104, 136 (1977) (reasonable return is relevent in determining the severity of the regulation's impact on the specific plaintiffs); *MacLeod v. County of Santa Clara*, 749 F.2d 541, 547-48 (9th Cir. 1984) (focus is on the injury suffered from the County's denial of the development permit). The inapplicability of the Ranch's test for economically viable use is underscored by the fact that cases after *Penn Central* have set forth the test for facial challenges without including "interference with reasonable investment-backed expectations." *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

[4]It is important to note that the Land Use Ordinance itself incorporates an extensive list of available uses, including single family dwellings. The County presented five specific uses it believed were economically viable.

III. *Conflict of Interest*

The Ranch claims that the County deprived it of due process in passing the 1980 General Plan and in denying the amendment sought by the Ranch. The basis for this claim is the Ranch's allegation that Supervisor Mankins participated in and voted on these matters despite his personal financial interest therein, stemming from his interest in the cabin, boat dock, and in real estate owned by the Cal-Shasta Club. The district court relied on two grounds in granting the County's motion for summary judgment on this claim. First, the court held that the Ranch's 42 U.S.C. § 1983 claim for violation of procedural due process is improper since California's Political Reform Act of 1984[5] provides a statutory remedy for the violation. Second, the district court held that there was no evidence showing that the alleged deprivation of due process under section 1983 was the result of County policy or custom.

A. *Official Policy or Custom*

[11] The district court granted summary judgment because the Ranch failed to present any evidence showing that the County had a policy or custom of allowing financially interested officials to participate in decision-making. In its complaint, the Ranch did not allege that the County had such a policy. The Ranch, however, claims that because Mankins was an official who himself made policy, his act of voting constituted official County policy.[6] The district court properly rejected this argument.

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[5]Under California Government Code § 87100, a public official is barred from participating in a governmental decision "in which he knows or has reason to know he has a financial interest." Cal. Gov't Code § 87100 (West 1987). Under section 91003, the Ranch is able to bring an action for injunctive relief. Cal. Gov't Code § 91003 (West 1987). Under section 91004, damages are available. Cal. Gov't Code § 91004 (West 1987). The Ranch is incorrect in arguing that damages are only available if they are sought by a prosecutor, since the statute states that damages are available in actions brought by "a person residing within the jurisdiction." *Id.*

[6]On appeal, the Ranch argues that the County waived any claim that Mankins acted contrary to County policy because throughout this litiga-

42 U.S.C. § 1983 requires that a deprivation of constitutional rights occur "under color of" state law. The County, as a municipality, may be liable under section 1983 only if the alleged violation was pursuant to "official municipal policy." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978). In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986), the Supreme Court explained the circumstances under which the actions of an official constitute "official municipal policy." *Id.* at 1299-1300. The Court stated that "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials *responsible for establishing final policy* with respect to the subject matter in question." *Id.* at 1300 (emphasis added).

The Ranch erroneously argues that the "subject matter in question" is the actual decision regarding the zoning restrictions. This argument is based upon the Ranch's mistaken attempt to piggyback its taking claim on its procedural due process claim. The "subject matter in question," however, is Mankins' *participation* in the decision-making process despite his alleged conflict. This participation is the source of any denial of procedural due process. *See id.* at 1300 ("subject matter" is law enforcement practices, not the indictment which resulted from such practices).

The question of whether Mankins had such "final policy-making authority" is a question of California law. *See id.* Under California law, Mankins did not have final authority to establish the County's official policy regarding participation in decision-making by an official with a conflict of inter-

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tion, the County has asserted Mankins' right to vote. Apparently, the Ranch offers this theory for the first time on appeal. We decline to address this argument, since it was not raised below. *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment*, 711 F.2d 902, 905 (9th Cir. 1983).

est. The Board of Supervisors may only establish official policy by a majority of the supervisors. Cal. Gov't Code § 25005 (West 1968). The Board adopted Resolution No. 76-456 by unanimous vote, requiring disqualification whenever a conflict of interest exists. Since the Ranch presented no material evidence showing that the County approved Mankins' participation, the district court properly granted summary judgment for the County on this basis.

B. *Adequate State Remedies*

[12] The Ranch also claims that the district court erred in holding that the availability of adequate state remedies defeated its due process claim. The district court relied upon *Parratt v. Taylor*, 451 U.S. 527 (1981), where the Supreme Court dismissed an inmate's section 1983 claim against prison officials for a deprivation of property in violation of his due process rights. The Court explained that the inmate had not stated a claim for relief under section 1983 since the inmate failed to seek adequate compensation through available state procedures. *Id.* at 543-44. The district court here held that *Parratt* required the Ranch to first seek compensation, available under California law, *see supra* note 5, before it could bring an action for deprivation of its right to procedural due process.

The Ranch argues that *Parratt*'s requirement of first seeking compensation through state procedures only applies to "prisoner" cases. This argument is meritless, since this requirement is broadly-stated and has been applied in cases other than those involving inmate actions against prison officials. *See, e.g., Mann v. City of Tucson*, 782 F.2d 790, 792-93 (9th Cir. 1986) (search and seizure case).

The Ranch also argues that *Parratt* is not applicable since the Ranch alleges a violation of its *substantive* due process rights. The district court recognized that this issue is unresolved. *Cf. Mann*, 782 F.2d at 792-93 (*Parratt* not applicable

where plaintiff is challenging the deprivation itself as opposed to procedural impropriety). Nevertheless, we need not decide this question. As discussed above, the Ranch's due process claim arising from Mankins' alleged conflict of interest is an attack on the decision-making process itself. The Ranch recasts its taking claim as a substantive due process claim, and then inappropriately links it to Mankins' conflict of interest. *See Hamilton Bank*, 473 U.S. at 199-200 (substantive due process claim is essentially the same as the taking claim). The Ranch is essentially claiming that this process was tainted by a voting supervisor's conflict of interest. This type of procedural claim is governed by *Parratt*. *Mann*, 782 F.2d at 792-93.

The Ranch also argues that the remedies available under California law are inadequate, such that *Parratt* is inapplicable. This argument is incorrect. First, *Parratt* applies whenever a *procedure* for redress of a deprivation of procedural due process is available. 451 U.S. at 543; *McRorie v. Shimoda*, 795 F.2d 780, 786 (9th Cir. 1986). The fact that more remedies are available under section 1983 than are available under the state procedure is irrelevant under these circumstances. *Parratt*, 451 U.S. at 453-54. Second, in claiming that the remedy is inadequate, the Ranch once again erroneously focuses upon its injury from the alleged taking of the property. Therefore, the Ranch's section 1983 claim is barred because there is an available state remedy.[7]

[7]The Ranch's claim under California law is not barred by the statute of limitations. Under the Political Reform Act, a claim must be filed within four years of the date of a violation. Cal. Gov't Code § 91000(c) (West 1987). However, under California's doctrine of equitable tolling of the statute of limitations, the statute may be tolled where: (1) a litigant has several legal remedies and pursues one remedy in good faith in another forum; (2) there is no tolling provision in the relevant statute; and (3) notice of the claim to defendant is timely. *Nelson v. International Paint Co.*, 716 F.2d 640, 645 (9th Cir. 1983); *Addison v. State*, 21 Cal.3d 313, 318-19, 146 Cal. Rptr. 224, 226-27 (1978).

C. *Claim under California Law and Under the Fourteenth Amendment*

The Ranch brought its due process claim under section 1983, California law, and under the the fourteenth amendment. As discussed above, the district court properly granted summary judgment for the County under section 1983. The district court also implicitly dismissed the claim as one under California law, and this decision was not an abuse of discretion. *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226, 227 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

However, the district court did not address the question of whether the Ranch could bring its claim of deprivation of due process directly under the fourteenth amendment, irrespective of implementing civil rights legislation (i.e., section 1983).

[13] The question of whether plaintiff may bring a direct cause of action under the fourteenth amendment is difficult and "extremely important," and has been left unanswered by the Supreme Court. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1977); *Aldinger v. Howard*, 427 U.S. 1, 4 n.3 (1976). *See generally* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3573.1 & n.20 (1984). On the record before us, we need not decide this issue. The Ranch has not clearly raised this issue,[8] and it has focused its case on section 1983.

IV. *Attorneys' Fees*

The County argues at length that the district court erred in

[8] At oral argument, the Ranch stated that it believed it had a direct cause of action under the fourteenth amendment for its taking claim. It apparently does not argue that it has a direct cause of action for a procedural due process violation. At least it fails to cite any authority or clearly state this claim.

denying its request for attorneys' fees under 42 U.S.C. § 1988. We review the district court's denial for an abuse of discretion. *Hensley v. Eckerhard*, 461 U.S. 424, 437 (1983).

In light of this standard of review, we uphold the decision of the district court. The district court applied the proper test in finding that "there is absolutely no indication that the plaintiff's action was 'groundless or without foundation.' " *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The County substantiates its claim that the district court abused its discretion by pointing to allegedly controlling Supreme Court decisions predating the final decision below. However, many questions raised by the Ranch have been decided only recently. *See, e.g., Kinzli* (1987); *Pembaur* (1986). Under these circumstances, we fail to find an abuse of discretion.

V. *Conclusion*

We affirm the decision of the district court. The Ranch's "as applied" challenge is not ripe for consideration; its facial challenge is unsupported. The claim based upon conflict of interest fails under section 1983. Finally, the district court did not abuse its discretion in denying the County's request for attorneys' fees.

AFFIRMED.

APPENDIX B

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reclassifying most of the remaining privately-owned, undeveloped land around Lake Nacimiento from a Recreation zone to a more restrictive Rural Lands zone. The property at issue is owned by appellant Ranch and borders the lake. The amendments to the County's General Plan changed the land use designation for almost all of the Ranch's property from Recreation to Rural. The Ranch applied for an amendment to the General Plan requesting redesignation of some to its property to Recreation. The County Planning Commission recommended the request, the County Board of Supervisors denied. One of the supervisors voting against the amendment, Mankins, was a member of the Cal-Shasta Club, owning property contiguous to the Ranch's property. The Club opposed the Ranch's application for an amendment. Mankins had some interests in the common realty of the Club and failed to disclose his membership and interests as required. The Ranch sued. It claims that the County's General Plan and Land Use Ordinance so restrict the Ranch's ability to develop its property that it accomplishes an unconstitutional taking. It also claims that under 42 U.S.C. § 1983, California law, and the United States Constitution it was denied its fourteenth amendment right to due process because Supervisor Mankins voted against the Ranch's proposed amendment despite his alleged, undisclosed conflict of interest. The district court granted the County's motion for summary judgment as to the Ranch's taking cause of action and due process cause of action.

[1] The district court viewed the evidence in the light most favorable to the Ranch as the nonmoving party. **[2]** The district court properly required the Ranch to make sufficient showings supporting the essential elements of its case whenever the Ranch would have carried the burden of proof at trial. **[3]** In order for an "as applied" regulatory taking claim to be ripe, a plaintiff must establish two components. **[4]** The County's response to the Ranch's informal development proposal request shows that it viewed the proposal as tentative, the denial was not final and authoritative, **[5]** and it cannot

meet its burden of showing futility. **[6]** The County's zoning restriction is facially invalid if it meets two tests. The ordinance meets the first test. **[7]** Under the second test, the precise meaning of "economically viable use" of land has not been clarified. Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property. **[8]** The Ranch was found to have failed to make a sufficient showing that there was no available beneficial use under the Plan or Ordinance. This prevents the ordinance from being facially overrestrictive, since the Ranch could apply for a variance or waiver. The Ranch has failed to make a sufficient showing that there was no available beneficial use. **[9]** The Ranch failed to present any evidence showing that the County had a policy of allowing financially interested officials to participate in decision-making. **[10]** The district court correctly held that *Parratt* required the Ranch to first seek compensation, available under California law, before it could bring an action for deprivation of its right to procedural due process. **[11]** The question of whether plaintiff may bring a direct cause of action under the fourteenth amendment has been left unanswered by the Supreme Court and this court need not decide this issue.

COUNSEL

Michael M. Berger and M. Reed Hunter, Los Angeles, California, for the plaintiff-appellant.

Vicki E. Land and Thomas F. Winfield, III, Los Angeles, California, for the defendant-appellee.

ORDER

The court's opinion in this case, filed on October 15, 1987 and reported at 830 F.2d 977 (9th Cir. 1987), is amended as follows:

Page 2796, from the third full paragraph (beginning "Under the second test") through the first full paragraph on page 2797 (until the beginning of Section III) is amended to read:

> Under the second test, the precise meaning of "economically viable use" of land is elusive and has not been clarified by the Supreme Court. *MacLeod v. County of Santa Clara*, 749 F.2d 541, 548 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985). Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property. *Agins*, 447 U.S. at 262; *Hodel*, 452 U.S. at 296. *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1982). The Ranch bears the ultimate burden of proof in showing that the restriction, on its face, denies beneficial uses. *See Keystone*, 107 S. Ct. at 1247 (plaintiffs face an uphill burden in making a facial attack); *Hodel*, 452 U.S. at 296-97 (Court scrutinized the restriction's language, yet did not require the governmental entity to prove the availability of beneficial uses); *Agins*, 447 U.S. at 262 (same).
>
> The district court found that the Ranch had failed to make a sufficient showing that there was no available beneficial use under the General Plan and Land Use Ordinance.[3] Specifically, the district court held that the Ranch failed to submit any evidence showing that a dude ranch in combination with other uses (other than a working ranch) was not economically viable. Moreover, the availability both of a variance under Land Use Ordinance § 22.01.044 and of addi-

[3]It is important to note that the Land Use Ordinance itself incorporates an extensive list of available uses, including single-family dwellings.

tional special uses under § 22.08.120 strongly suggests that there are other economically beneficial uses not expressly included. This fact alone logically prevents the ordinance from being overrestrictive on its face, since the Ranch could apply for a variance or waiver of the restrictions.

Ranch argues that the County's regulation deprives it of the opportunity to recoup its "profit expectation." Without commenting on the significance of Ranch's profit expectations, we find Ranch's argument unpersuasive.[4] Ranch remains free to pursue its profit expectations by submitting a development application to the County. *See Agins*, 447 U.S. at 262.

OPINION

HALL, Circuit Judge:

Plaintiff, Lake Nacimiento Ranch Company (Ranch) brought this action against the County of San Luis Obispo (County), alleging that the County's restrictions on its property accomplished an unconstitutional taking. The Ranch also claims that the County Board of Supervisors violated its right to due process because one of the voting supervisors had a conflict of interest. The district court granted summary judgment in favor of the County, which the Ranch now appeals. The district court also denied the County's request for attorneys' fees, which the County appeals.

---

[4]Some controversy exists concerning the appropriateness of considering a land owner's "profit expectations" in determining on a facial challenge whether a regulation denies the land owner the "economically viable use" of the owner's property. *Compare Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-91 & n.12 (1985) *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1249 (1987).

I. *Overview*

Lake Nacimiento is an artificial reservoir created in 1960 and located in northern San Luis Obispo County. As required by California law, the County has a comprehensive long-term General Plan for development, which includes a Land Use Element. *See* Cal. Gov't Code § 65302 (West 1983). The Land Use Element describes the County's official policy on the location, growth and development of land uses. *Id.* § 65302(a). The County also has a zoning ordinance, called the Land Use Ordinance, which states the County's development standards and review procedures.

The County adopted the Nacimiento/San Antonio General Plan in 1971. In 1980, the County amended the Land Use Element and the Land Use Ordinance, reducing the allowed residential densities and reclassifying most of the remaining privately-owned, undeveloped land around the lake from a "Recreation" zone to a more restrictive "Rural Lands" zone. The Rural Lands category, like the Recreation category, expressly permits single-family residences and light agricultural uses. In fact, the Rural Lands category outlines 8 groups of allowed uses and 42 groups of special uses.

The property which is the subject of this action is owned by the Ranch and comprises approximately 1,500 acres bordering the south shore of Lake Nacimiento. The Ranch acquired the property in 1964.[1] Since that time, the property has been held for investment and leased in the interim for cattle and horse grazing and for equestrian purposes. The 1980 amendments to the County's General Plan changed the land use designation for almost all of the Ranch's property from Recreation to Rural Lands.

[1]The property was acquired as part of a 3,000 acre parcel. The Ranch paid about $1 million for the entire parcel. Part of the parcel has been sold.

In 1981, the Ranch applied for an amendment to the General Plan, requesting the redesignation of 800 acres of the property as a Recreation zone. On November 19, 1981, the County Planning Commission unanimously recommended the adoption of the requested amendment. On December 14, 1981, the County Board of Supervisors voted 3-2 to deny the Ranch's proposed amendment.

One of the supervisors voting against the amendment, Howard Mankins, was a member of the Cal-Shasta Club, a private, non-profit recreational organization owning property contiguous to the Ranch's property. The Cal-Shasta Club openly opposed the Ranch's application for an amendment. Had the amendment been enacted, more people would have had access to lake-shore properties for recreational purposes, thereby diluting the degree of exclusive use enjoyed by club members. The Ranch claims that Mankins owns a cabin, a boat dock, and has an interest in the common realty of the Cal-Shasta Club. Mankins did not disclose his membership in the Cal-Shasta Club or these alleged interests at the December 14 hearing or in the financial interest statements required by California law. *See* Cal. Gov't Code §§ 87100-03 (West 1987).

On June 11, 1982, the Ranch initiated this action against the County. The Ranch alleges two causes of action. First, the Ranch claims that the County's General Plan and its Land Use Ordinance so restrict the Ranch's ability to develop its property that they accomplish an unconstitutional taking of the property in violation of the fifth and fourteenth amendments. The Ranch requests orders invalidating, and enjoining the County from enforcing, the 1980 amendments as they apply to the Ranch. It also requests damages under 42 U.S.C. § 1983 for the taking. Second, the Ranch claims that under 42 U.S.C. § 1983, California law, and the United States Constitution it was denied its fourteenth amendment right to due process because Supervisor Mankins voted against the Ranch's proposed amendment despite his alleged, undisclosed conflict of interest. Pursuant to this cause of action, the

Ranch requests damages and one of the following: either the invalidation of the vote of the Board of Supervisors and the sustaining of the Planning Commission's recommendation approving the amendment, or the invalidation of the 1981 decision changing the land use designation to Rural Lands.

The district court, in its unpublished opinion, granted the County's motion for summary judgment as to the Ranch's taking cause of action. Both parties moved for summary judgment as to the due process cause of action, and the district court granted the County's motion. The Ranch now appeals these decisions. The County also appeals from the district court's denial of its motion for attorneys' fees under 42 U.S.C. § 1988.

II. *The Ranch's Taking Claim*

On appeal, the Ranch argues that the district court erred in granting the County's summary judgment motion on the taking claim. We review the district court's grant of the County's summary judgment motion de novo. *Martino v. Santa Clara Valley Water District*, 703 F.2d 1141, 1145 (9th Cir.), *cert. denied*, 464 U.S. 874 (1983). We must determine, viewing all evidence and factual inferences in the light most favorable to the Ranch, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

A. *Standards For a Motion for Summary Judgment*

[1] The Ranch claims that the district court failed to view the evidence in the light most favorable to the Ranch as the nonmoving party. The district court is obliged to apply this standard in considering a summary judgment motion, *Twentieth Century-Fox Film Corp. v. MCA, Inc.*, 715 F.2d 1327, 1328-29 (9th Cir. 1983), a nd it apparently did so. Throughout its opinion, the district court accepted the

Ranch's version of the material facts, unless the Ranch failed to submit evidence supporting its version. Therefore, the district court applied the correct standard in viewing the facts.

The Ranch also claims that the district court erroneously placed the burden of proof on the Ranch, and not on the County. The Ranch misunderstands its own burden of proof, which has been clarified by the Supreme Court's recent decision, *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986).

[2] Under *Celotex*, the Ranch, as the nonmoving party, may avoid summary judgment against it only by making "a showing sufficient to establish the existence of an element essential to [its] case, and on which [the Ranch] will bear the burden of proof." 106 S. Ct. at 2552-53. In contrast, the County, as the party seeking summary judgment, "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 2553. The County was not required to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (emphasis in original). The district court properly required the Ranch to make "sufficient showings" supporting the essential elements of its case whenever the Ranch would have carried the burden of proof at trial.

B. *The Ranch's "As Applied" Challenge*

The Ranch claims that the district court failed to address its claim that the General Plan, the Land Use Ordinance, and the Board of Supervisors' denial of the amendment "as applied" to its property accomplished an unconstitutional taking. The Ranch argues that the district court only addressed its "facial" challenge to these County actions. This is not the case. The district court decided that the Ranch's "as applied" taking claim was not ripe for consideration. We

review de novo the district court's ruling that the Ranch's claim was not ripe. *Assiniboine and Sioux Tribes v. Board of Oil and Gas*, 792 F.2d 782, 787 (9th Cir. 1986).

[3] In order for an "as applied" regulatory taking claim to be ripe, a plaintiff must establish two components: (1) that the regulation has gone so far that it has "taken" plaintiff's property; and (2) that any compensation tendered for such taking is not "just." *MacDonald, Sommer & Frates v. Yolo County*, 106 S. Ct. 2561, 2566 (1986); *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453, *modified* 87 Daily Journal D.A.R. 5058 (9th Cir.) (filed June 4, 1987, amended August 7, 1987). To establish that the regulation has "gone too far," the Ranch must show that the County has made "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald*, 106 S. Ct. at 2566. This final determination requires two decisions against the Ranch: a rejected development plan and the denial of a variance. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 187-88 (1985); *Kinzli*, 818 F.2d at 1454.

[4] The Ranch admits that it has submitted to the County only an *informal* development proposal for a private membership recreational vehicle club in conjunction with its request for an amendment to the Land Use Ordinance. The County's response to the informal request shows that it viewed the proposal as "tentative." The County's response specified the numerous deficiencies in the informal proposal and suggested ways to remedy them. In light of these facts, the County's denial of this informal request is not a final and authoritative decision exposing the nature and extent of permissible development under the Rural Lands classification. *See MacDonald*, 106 S. Ct. at 2567-69.

[5] The Ranch correctly argues that it can avoid the ripeness requirement of a final determination if it can show that the submission of a development plan and an application for

a variance would be futile. *American Savings and Loan Ass'n v. County of Marin*, 653 F.2d 364, 371 (9th Cir. 1981). The Ranch has the "heavy burden" of showing futility. *Id.* The Ranch cannot, at this point, meet this burden. As explained in *Kinzli*, "*at least one* meaningful application" for a development project must be made. *Kinzli*, 818 F.2d at 1454-55 (emphasis in original). In addition, the Ranch must have also made a meaningful application for a variance under the zoning ordinance. *Id.* at 1455 n.6. Since the Ranch has failed to submit such applications, it may not argue that it would be futile to secure a final determination from the County.[2]

C. *The Ranch's Facial Challenge*

As the district court properly recognized, the Ranch may challenge the zoning restriction on the basis that the "mere enactment" of the restriction constitutes a taking of its property. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Martino*, 703 F.2d at 1146 n.2. The Ranch, however, faces an "uphill battle in making a facial attack on the [zoning restriction] as a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1247 (1987). The district court, therefore, properly placed the burden of proof on the Ranch.

[6] The County's zoning restriction is facially invalid if: (1) it does not substantially advance legitimate state interests, or (2) it denies an owner economically viable use of his land. *Agins*, 447 U.S. at 260; *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-96 (1981). The County's ordinance meets the first test, *see Cormier v. County of*

[2]The recent Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987), is consistent with the Supreme Court's previous rulings dealing with ripeness. In *First English Evangelical*, the Court held that the taking claim was ripe because the state court below had assumed that a taking had occurred. *Id.* at 2384. The Court thereby distinguished its rulings in *MacDonald* and in *Agins*. *Id. See also Kinzli* at n.7 (as modified).

San Luis Obispo, 161 Cal. App. 3d 850, 207 Cal. Rptr. 880 (1984), and the Ranch does not argue otherwise.

[7] Under the second test, the precise meaning of "economically viable use" of land is elusive and has not been clarified by the Supreme Court. *MacLeod v. County of Santa Clara*, 749 F.2d 541, 548 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985). Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property. *Agins*, 447 U.S. at 262; *Hodel*, 452 U.S. at 296, *William C. Haas & Co. v. City and County of San Francisco*, 605 F.2d 1117 (9th Cir. 1979), *cert. denied*, 445 U.S. 928 (1982). The Ranch bears the ultimate burden of proof in showing that the restriction, on its face, denies beneficial uses. *See Keystone*, 107 S. Ct. at 1247 (plaintiffs face an uphill burden in making a facial attack); *Hodel*, 452 U.S. at 296-97 (Court scrutinized the restriction's language, yet did not require the governmental entity to prove the availability of beneficial uses); *Agins*, 447 U.S. at 262 (same).

[8] The district court found that the Ranch had failed to make a sufficient showing that there was no available beneficial use under the General Plan and Land Use Ordinance.[3] Specifically, the district court held that the Ranch failed to submit any evidence showing that a dude ranch in combination with other uses (other than a working ranch) was not economically viable. Moreover, the availability both of a variance under Land Use Ordinance § 22.01.044 and of additional special uses under § 22.08.120 strongly suggests that there are other economically beneficial uses not expressly included. This fact alone logically prevents the ordinance from being overrestrictive on its face, since the Ranch could apply for a variance or waiver of the restrictions.

[3]It is important to note that the Land Use Ordinance itself incorporates an extensive list of available uses, including single-family dwellings.

Ranch argues that the County's regulation deprives it of the opportunity to recoup its "profit expectation." Without commenting on the significance of Ranch's profit expectations, we find Ranch's argument unpersuasive.[4] Ranch remains free to pursue its profit expectations by submitting a development application to the County. *See Agins*, 447 U.S. at 262.

III. *Conflict of Interest*

The Ranch claims that the County deprived it of due process in passing the 1980 General Plan and in denying the amendment sought by the Ranch. The basis for this claim is the Ranch's allegation that Supervisor Mankins participated in and voted on these matters despite his personal financial interest therein, stemming from his interest in the cabin, boat dock, and in real estate owned by the Cal-Shasta Club. The district court relied on two grounds in granting the County's motion for summary judgment on this claim. First, the court held that the Ranch's 42 U.S.C. § 1983 claim for violation of procedural due process is improper since California's Political Reform Act of 1984[5] provides a statutory remedy for the violation. Second, the district court held that there was no evidence showing that the alleged deprivation of due process under section 1983 was the result of County policy or custom.

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[4]Some controversy exists concerning the appropriateness of considering a land owner's "profit expectations" in determining on a facial challenge whether a regulation denies the land owner the "economically viable use" of the owner's property. *Compare Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190-91 & n.12 (1985) *with Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S. Ct. 1232, 1249 (1987).

[5]Under California Government Code § 87100, a public official is barred from participating in a governmental decision "in which he knows or has reason to know he has a financial interest." Cal. Gov't Code § 87100 (West 1987). Under section 91003, the Ranch is able to bring an action for injunctive relief. Cal. Gov't Code § 91003 (West 1987). Under section 91004, damages are available. Cal. Gov't Code § 91004 (West 1987). The Ranch is incorrect in arguing that damages are only available if they are sought by a prosecutor, since the statute states that damages are available in actions brought by "a person residing within the jurisdiction." *Id.*

A. *Official Policy or Custom*

[9] The district court granted summary judgment because the Ranch failed to present any evidence showing that the County had a policy or custom of allowing financially interested officials to participate in decision-making. In its complaint, the Ranch did not allege that the County had such a policy. The Ranch, however, claims that because Mankins was an official who himself made policy, his act of voting constituted official County policy.[6] The district court properly rejected this argument.

42 U.S.C. § 1983 requires that a deprivation of constitutional rights occur "under color of" state law. The County, as a municipality, may be liable under section 1983 only if the alleged violation was pursuant to "official municipal policy." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 691 (1978). In *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S. Ct. 1292 (1986), the Supreme Court explained the circumstances under which the actions of an official constitute "official municipal policy." *Id.* at 1299-1300. The Court stated that "municipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials *responsible for establishing final policy* with respect to the subject matter in question." *Id.* at 1300 (emphasis added).

The Ranch erroneously argues that the "subject matter in question" is the actual decision regarding the zoning restrictions. This argument is based upon the Ranch's mistaken

[6]On appeal, the Ranch argues that the County waived any claim that Mankins acted contrary to County policy because throughout this litigation, the County has asserted Mankins' right to vote. Apparently, the Ranch offers this theory for the first time on appeal. We decline to address this argument, since it was not raised below. *Rainbow Pioneer No. 44-18-04A v. Hawaii-Nevada Investment*, 711 F.2d 902, 905 (9th Cir. 1983).

attempt to piggyback its taking claim on its procedural due process claim. The "subject matter in question," however, is Mankins' *participation* in the decision-making process despite his alleged conflict. This participation is the source of any denial of procedural due process. *See id.* at 1300 ("subject matter" is law enforcement practices, not the indictment which resulted from such practices).

The question of whether Mankins had such "final policy-making authority" is a question of California law. *See id.* Under California law, Mankins did not have final authority to establish the County's official policy regarding participation in decision-making by an official with a conflict of interest. The Board of Supervisors may only establish official policy by a majority of the supervisors. Cal. Gov't Code § 25005 (West 1968). The Board adopted Resolution No. 76-456 by unanimous vote, requiring disqualification whenever a conflict of interest exists. Since the Ranch presented no material evidence showing that the County approved Mankins' participation, the district court properly granted summary judgment for the County on this basis.

B. *Adequate State Remedies*

[10] The Ranch also claims that the district court erred in holding that the availability of adequate state remedies defeated its due process claim. The district court relied upon *Parratt v. Taylor*, 451 U.S. 527 (1981), where the Supreme Court dismissed an inmate's section 1983 claim against prison officials for a deprivation of property in violation of his due process rights. The Court explained that the inmate had not stated a claim for relief under section 1983 since the inmate failed to seek adequate compensation through available state procedures. *Id.* at 543-44. The district court here held that *Parratt* required the Ranch to first seek compensation, available under California law, *see supra* note 5, before it could bring an action for deprivation of its right to procedural due process.

The Ranch argues that *Parratt*'s requirement of first seeking compensation through state procedures only applies to "prisoner" cases. This argument is meritless, since this requirement is broadly-stated and has been applied in cases other than those involving inmate actions against prison officials. *See, e.g., Mann v. City of Tucson,* 782 F.2d 790, 792-93 (9th Cir. 1986) (search and seizure case).

The Ranch also argues that *Parratt* is not applicable since the Ranch alleges a violation of its *substantive* due process rights. The district court recognized that this issue is unresolved. *Cf. Mann,* 782 F.2d at 792-93 (*Parratt* not applicable where plaintiff is challenging the deprivation itself as opposed to procedural impropriety). Nevertheless, we need not decide this question. As discussed above, the Ranch's due process claim arising from Mankins' alleged conflict of interest is an attack on the decision-making process itself. The Ranch recasts its taking claim as a substantive due process claim, and then inappropriately links it to Mankins' conflict of interest. *See Hamilton Bank,* 473 U.S. at 199-200 (substantive due process claim is essentially the same as the taking claim). The Ranch is essentially claiming that this process was tainted by a voting supervisor's conflict of interest. This type of procedural claim is governed by *Parratt*. *Mann,* 782 F.2d at 792-93.

The Ranch also argues that the remedies available under California law are inadequate, such that *Parratt* is inapplicable. This argument is incorrect. First, *Parratt* applies whenever a *procedure* for redress of a deprivation of procedural due process is available. 451 U.S. at 543; *McRorie v. Shimoda,* 795 F.2d 780, 786 (9th Cir. 1986). The fact that more remedies are available under section 1983 than are available under the state procedure is irrelevant under these circumstances. *Parratt,* 451 U.S. at 453-54. Second, in claiming that the remedy is inadequate, the Ranch once again erroneously focuses upon its injury from the alleged taking of the prop-

erty. Therefore, the Ranch's section 1983 claim is barred because there is an available state remedy.[7]

C. *Claim under California Law and Under the Fourteenth Amendment*

The Ranch brought its due process claim under section 1983, California law, and under the the fourteenth amendment. As discussed above, the district court properly granted summary judgment for the County under section 1983. The district court also implicitly dismissed the claim as one under California law, and this decision was not an abuse of discretion. *Arizona v. Cook Paint & Varnish Co.*, 541 F.2d 226, 227 (9th Cir. 1976), *cert. denied*, 430 U.S. 915 (1977).

However, the district court did not address the question of whether the Ranch could bring its claim of deprivation of due process directly under the fourteenth amendment, irrespective of implementing civil rights legislation (i.e., section 1983).

[11] The question of whether plaintiff may bring a direct cause of action under the fourteenth amendment is difficult and "extremely important," and has been left unanswered by the Supreme Court. *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 278 (1977); *Aldinger v. Howard*, 427 U.S. 1, 4 n.3 (1976). *See generally* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Proce-*

[7]The Ranch's claim under California law is not barred by the statute of limitations. Under the Political Reform Act, a claim must be filed within four years of the date of a violation. Cal. Gov't Code § 91000(c) (West 1987). However, under California's doctrine of equitable tolling of the statute of limitations, the statute may be tolled where: (1) a litigant has several legal remedies and pursues one remedy in good faith in another forum; (2) there is no tolling provision in the relevant statute; and (3) notice of the claim to defendant is timely. *Nelson v. International Paint Co.*, 716 F.2d 640, 645 (9th Cir. 1983); *Addison v. State*, 21 Cal.3d 313, 318-19, 146 Cal. Rptr. 224, 226-27 (1978).

dure § 3573.1 & n.20 (1984). On the record before us, we need not decide this issue. The Ranch has not clearly raised this issue,[8] and it has focused its case on section 1983.

IV. *Attorneys' Fees*

The County argues at length that the district court erred in denying its request for attorneys' fees under 42 U.S.C. § 1988. We review the district court's denial for an abuse of discretion. *Hensley v. Eckerhard*, 461 U.S. 424, 437 (1983).

In light of this standard of review, we uphold the decision of the district court. The district court applied the proper test in finding that "there is absolutely no indication that the plaintiff's action was 'groundless or without foundation.' " *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978). The County substantiates its claim that the district court abused its discretion by pointing to allegedly controlling Supreme Court decisions predating the final decision below. However, many questions raised by the Ranch have been decided only recently. *See, e.g., Kinzli* (1987); *Pembaur* (1986). Under these circumstances, we fail to find an abuse of discretion.

V. *Conclusion*

We affirm the decision of the district court. The Ranch's "as applied" challenge is not ripe for consideration; its facial challenge is unsupported. The claim based upon conflict of interest fails under section 1983. Finally, the district court did not abuse its discretion in denying the County's request for attorneys' fees.

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[8] At oral argument, the Ranch stated that it believed it had a direct cause of action under the fourteenth amendment for its taking claim. It apparently does not argue that it has a direct cause of action for a procedural due process violation. At least it fails to cite any authority or clearly state this claim.

AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

F I L E D
MAR 24 1988
Cathy A. Catterson, Clerk
U.S. Court of Appeals

LAKE NACIMIENTO RANCH CO.,
Plaintiff-Appellant,

v.

COUNTY OF SAN LUIS OBISPO,
Defendant-Appellee.

Nos. 85-6475, 86-5858
CV-82-2932-CBM

ORDER

Before: HALL, NOONAN, and THOMPSON, Circuit Judges.

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

F I L E D
OCT 23 1985
Clerk, U.S. District Court
Central District of California
By Deputy

E N T E R E D
OCT 24 1985
Clerk, U.S. District Court
Central District of California
By Deputy

LAKE NACIMIENTO RANCH CO.,
Plaintiff,

v.

COUNTY OF SAN LUIS OBISPO,
Defendant.

CV-82-2932-CBM
JUDGMENT AND ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff Lake Nacimiento Ranch Company (Ranch) filed this lawsuit after the County's Board of Supervisors voted 3-2 to deny Ranch's application for a change of land use. In its complaint, Ranch claims that the County's General Plan and regulations adopted in 1980 effected a "taking" of its property without just compensation. Secondly, Ranch alleges that the County Board of Supervisors violated due process because one of the voting supervisors had a conflict of interest.

There are presently two motions before this court. Ranch seeks summary judgment on the due process cause of action.

Defendant County of San Luis Obispo (County) agrees with Ranch that there are no factual issues in dispute on this issue and has cross-motioned for summary judgment on the same issue. In addition, County is moving the court for summary judgment on the "taking" cause of action as well.

The Court, having reviewed the moving papers, oppositions thereto, and all the pleadings filed herein, now issues the following rulings:

1. Defendant's Motion for Summary Judgment as to the "taking" cause of action is GRANTED.

2. Defendant's Motion for Summary Judgment as to the due process cause of action is GRANTED. Conversely, Plaintiff's Motion for Summary Judgment as to the due process cause of action is DENIED

The reasoning behind the Court's rulings are discussed below:

II. FACTS

Lake Nacimiento is an artificial reservoir created in 1960 in Northern San Luis Obispo County. As required by California law, the County maintains a comprehensive long-term General Plan for the county's development, including a Land Use Element (LUE), which describes the County's official policy on the location, growth, and development of land uses. Cal. Gov't Code § 6530. The County also has a zoning ordinance (LUO) which states the County's development standards and review procedures.

The County adopted the Nacimiento/San Antonio General Plan in 1971. In 1980, the County enacted the *amendments* to its General Plan and LUO that are the target of Plaintiff's "taking" claim. The principal changes made in the new LUE were to reduce the residential density previously proposed for the major existing developments and to reclassify most of the remaining privately owned, undeveloped land around the lake

from the previously existing L (Recreation) zone to the Rural Lands category.

Plaintiff owns approximately 1,500 acres bordering the lake. The Ranch acquired the property for investment in 1964, and the only use to which it has ever put the property is to hold it for investment and to lease it in the interim for cattle and horse grazing and equestrian purposes. The 1980 amendments to the County's General Plan changes the land use designation of almost all of the Ranch's property from Recreational to Rural Lands.

On January 30, 1981, the Ranch applied for an amendment to the General Plan to have approximately 800 acres of its property placed in the Recreational category. The Planning Commission recommended the approval of the application with respect to approximately 630 acres of the property. However, on December 14, 1981, the Board of Supervisors, at a public hearing, voted 3-2 to deny the Ranch's proposed amendments to the General Plan. On June 11, 1982, the Ranch filed its complaint in this action.

III. ANALYSIS

Plaintiff has alleged two causes of action in its complaint. Plaintiff's first cause of action alleges that the Defendant has violated its 5th Amendment right by "taking" Plaintiff's property without just compensation. Plaintiff's second cause of action alleges that the Defendant violated its due process rights guaranteed by the 14th Amendment.

A. TAKING ISSUE

Only the County has moved for summary judgment on the "taking" issue. The County submits that for purposes of this motion, it has assumed to be true all factual issues that it would otherwise dispute at trial. Basically, the County contends that as a matter of law, this court can rule that the

County's land use regulations did not constitute a "taking" and hence required no compensation.

There is abundant case law on this issue of whether zoning regulations constitute a "taking" when they destroy or adversely affect recognized real property interests. It is well recognized that zoning laws are valid exercises of police power; however, courts must still decide whether a particular regulation constitutes a "taking". As the Supreme Court stated long ago, "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). The focus then is on the factual circumstances of each case to see if a taking has occurred.

The Supreme Court in *Penn Central Transportation Co. v. New York*, 438 U.S. 104 (1978), was faced with the issue of whether the application of New York City's Landmarks Law had "taken" appellants' property without just compensation. The Court held that there was no "taking" of appellants' property within the meaning of the Fifth Amendment. The Court noted that in deciding whether a particular governmental action has effected a "taking", the Court focuses both on the character of the action and on the nature and extent of the interference with property rights. The Court rejected the proposition that diminution in property value, standing alone, can establish a "taking"; *see Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning laws); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87-1/2% diminution in value).

Two years later, in *Agins v. Tiburon*, 447 U.S. 255 (1980), the Supreme Court was faced with facts similar to the ones currently before the court. Appellants acquired five acres of unimproved land in Tiburon, California, for residential development. Subsequently, the city adopted two ordinances that modified existing zoning requirements with the result being that development was limited. The appellants never

sought approval for development of their land under the zoning ordinances.

The appellants filed suit and one cause of action requested a declaration that the zoning ordinances were facially unconstitutional. The Supreme Court affirmed the California Supreme Court's holding the the zoning ordinances on their face did not take the appellants' property without just compensation. The Court held that since the appellants had not submitted a plan for development of their property as the ordinances permit, there is yet no concrete controversy regarding the application of the specific zoning provisions. (Citations omitted.) Thus, the only question before the Court was whether the *enactment* of the zoning ordinances constituted a taking.

The application of general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. *Agins*, at 260; *Penn Central*, at 138, n.36. The court's inquiry required a weighing of private and public interests. The Court, in *Agins*, held that the specific zoning regulations at issue were legitimate exercises of the city's police power to protect the residents of Tiburon from the ill effects of urbanization. The Court concluded by noting that the appellants were now free to pursue their reasonable investment expectations by submitting a development plan to local officials.

The Supreme Court seems to make it clear that there is a different analysis when the claim is a *facial* attack on a zoning ordinance. In *Hodel v. Virginia Surface Mining and Recl. Assn.*, 452 U.S. 264 (1981), the Court held that appellees' taking claim arose in the context of a facial challenge since it presented no concrete controversy concerning either application of the Act to particular surface mining operations or its effect on specific parcels of land. Thus, the only issue properly before the District Court and, in turn, the Supreme Court, was whether the "mere enactment" of the Surface Mining Act constitutes a taking. The test to be applied is whether the

statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land. . ." *Agins; Penn Central.*

In the instant case, the County contends that the Ranch is *facially* attacking the 1980 LUE/LUO. Because the Ranch has not applied to the County for approval of any specific plan for development, it must prove that the 1980 LUE/LUO is unconstitutional despite the eight groups of allowable uses and 42 groups of special uses for which it can apply. Thus, the validity of the ordinances must be judged by "focusing on the uses the regulations permit." *Penn Central*, at 131. If the regulation is a valid exercise of the police power, it is not a taking if a reasonable use of the property remains. *American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364 (9th Cir. 1981); *Agins, supra.*

Courts typically find that there is no taking if any "economically viable use" of the property remains. Thus, a court does not find there to be a taking solely because the regulation prevents the highest and *best use* of the land. *Haas v. City & County of San Francisco*, 615 F.2d 1117 (9th Cir. 1979). Furthermore, a regulation is not unconstitutional merely because it dramatically reduces the value of the property. *Hadacheck, supra*, (value reduced from $800,000 to $60,000). Thus, the question becomes: is there an economically viable use of the Ranch's property given the 1980 amendments to the LUE/LUO?

In *MacLoed v. County of Santa Clara*, 749 F.2d 541 (9th Cir. 1984), the Court of Appeals held that where the landowner could continue to use the property for investment purposes or for cattle ranching, denial of a permit to harvest timber did not deny the owner of all economically viable use of the property so as to amount to a taking. The Court refused to equate immediate overall profitability with the requirement of "economic viability." To do so, the Court stated, would be a major departure from the prior jurisprudence in this area. Thus, the Court held that the district court *erred* when it considered the immediate overall profitability as the measure

of whether or not there had been a taking of appellant MacLeod's ranch property. The Court stated:

> It is clear from the record that the denial of the permit in no way affected MacLeod's ability to continue to use the property for "its original intended uses." His assertion that the denial of the permit effectively extinguished an expected opportunity for exploitation of his property, thereby preventing him from pursuing the highest and best use of his property, is not enough to establish a taking. *See Penn Central, supra.*

Unfortunately, the Supreme Court has never elaborated on the meaning of "economically viable." However, in *Penn Central*, the term was linked to "the ability to use the property for its intended purpose in a gainful fashion." Furthermore, the Supreme Court has stated with respect to a "lost future profits" based taking claim that:

> Prediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform. Further, perhaps because of its very uncertainty, the interest in anticipated gains had traditionally been viewed as less compelling then other property-related interests.

Andrus v. Allard, 444 U.S. 51 (1979)

In the instant action, the County contends that it is undisputed that there is an economically viable use remaining on Plaintiff's property. The County relies on evidence (The April 9, 1984 SLO County Planning Department Report, Ex. C, Plaintiff's Opposition), which contends that the list of economically viable uses that could potentially be developed on the Ranch property include:

1. Livestock Specialties — Intensive
2. Rural Sports and Group Facilities
3. Single Family Dwellings
4. Mobile Home Dwellings
5. Crop Production and Grazing

Plaintiff offers several declarations in an attempt to assert that the above uses are not viable. (See Declarations of Gerst, Botts, Maddalena, Schenberger & Strong[1]) However the Court does not find any evidence offered by Plaintiff which purports to opine on the profitability of a dude ranch standing alone, or a dude ranch in combination with other uses. Plaintiff's evidence shows only that a dude ranch, incidental to a working ranch, would not be economically viable.

However, Plaintiff has submitted, pursuant to Local Rule 9.4.6, two additional reports by the Strong Associates. The latter report purports to opine that a dude ranch operating alone would not be economically feasible. However, Plaintiff never designated David Strong as an expert witness. Expert witnesses were designated long ago by the parties and discovery was completed over nine months ago. Consequently, Defendant was never given the opportunity to notice depositions or conduct discovery involving the Strong Associates. Thus, the Court will not consider the Strong Associates reports in conjunction with the cross-motions for summary judgment. *Even if* the Court were to consider these unauthorized reports, Plaintiff still has failed to submit evidence on the economic viability of a dude ranch in combination with other uses.

Furthermore, Plaintiff concedes that a dude ranch "could be" economically viable, but contends that the requirements of the 1980 LUO state that a dude ranch be "incidental to a working ranch." Plaintiff further contends that the property is not physically capable of being operated as a profitable working ranch. However, Section 22.10.112(c) of the LUO expressly

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[1] Defendant objects to David Strong's declaration on the grounds that it was improperly filed with Plaintiff's reply papers, that it is made by a witness not designated as an expert, and that it does not even create an issue of material fact. However, *even if* the court considered Strong's declaration, Defendant would still prevail on its motion for summary judgment since Strong only addresses the issue of economic viability of a dude ranch incidental to a working ranch and does not comment on the economic viability of a dude ranch standing alone or a dude ranch in combination with other uses.

authorized the Planning Commission to waive the "incidental to a working ranch" requirement of LUO Section 22.08.072(b) when it makes the necessary finding required by Section 22.08.12(c). (See Declaration of Paul Crawford, Exh. J to County's Motion and Tingle's Declaration.

The Ranch's underlying claim seems to be that its profit on its investment is *less* than it would have been under the old General Plan and Zoning Ordinance. However, the County contends that even if the Ranch had suffered a serious diminution in the value of its property under the 1980 amendments, diminution, standing alone, could not create a taking. (Citations omitted.) In a similar zoning case, *Haas, supra*, the district court had granted summary judgment in favor of the city and the landowner property owner appealed. The Ninth Circuit affirmed and stated:

> That the zoning restrictions prevent Haas from recovering its investment does not mean that they are constitutionally defective. Of course, Haas would not have paid as much for the property as it did if it had known that it would not be able to build high-rises on it. But its *disappointed expectations* in that regard cannot be turned into a taking, nor can Haas transform a regulation into a taking by recharacterizing the diminution of the value of its property as an inability to obtain a favorable return on its investment. (Emphasis added).

See also, Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir. 1984) [whether a zoning regulation constitutes a taking on the basis that it denies a property owner economically viable use of its land is *not* determined by whether it denies the owner a reasonable return on its investment.]

In the instant case, Plaintiff's own evidence shows that it could have sold the property under the 1980 amendments at a profit; Ranch admits that it valued the property in December 1975, at the time of formation of the limited partnership, at $521,000. Between then and the time of the alleged taking

(1980), it admits it only expended $65,565 on taxes and other expenses, and it admits it had a potential profit of $461,035, and it admits by March 1984 the market value of the property was over *three times* the amount of its initial investment. Thus, immediately following the impact of the 1980 LUE/ LUO amendment the market value of Plaintiff's land was $995,500 and by March 1984 the market value had *increased* to $1,740,000. (See Defendant's Uncontroverted Facts Nos. 14, 18, 20, 25, 26, and 46.) However, Plaintiff's evidence also shows that the March 1984 values were $1,740,000 zoned Rural, compared to $8,550,000 zoned Recreation. Overall, it does not appear that there was a dimunition in value of Ranch's land, only "disappointed expectations." Ranch can still make a *profit* on its earlier investment by selling the property today. Thus, Plaintiff's claim that there was a taking is significantly weakened.

Based on the above, the Court grants Defendant's Motion for Summary Judgment because there are no material factual issues in dispute.

Plaintiff has failed to submit evidence refuting Defendant's evidence that a dude ranch by itself, or in combination with other uses, would be an economically viable use of Plaintiff's property. Thus, as a matter of law, this Court holds that there has not been a "taking" of Plaintiff's property by the County.

B. DUE PROCESS ISSUE

Plaintiff also attempts to establish a claim that the County deprived it of due process in processing both the 1980 General Plan and the amendment to the plan sought by it. Plaintiff claims that one member of the County Board of Supervisors, Howard Mankins, participated in and voted on matters pertaining to its property in spite of personal financial conflict. Both Plaintiff and Defendant submit that there are no material issues of fact in dispute and judgment can be entered as a matter of law on this issue. Plaintiff had filed a motion for partial summary judgment on this claim.

Plaintiff contends that Supervisor Mankins did not disclose his membership in the Cal-Shasta Club — a private, non-profit, recreation club which is contiguous to the Ranch's property. Had the Ranch's proposed General Plan amendment been enacted, use of lakeshore properties for recreational purposes would have been opened to more persons, thus diluting the exclusivity enjoyed by club members. The Cal-Shasta Club opposed Ranch's application before both the Planning Commission *and* the Board of Supervisors. Plaintiff contends that by concealing his club membership and failing to disqualify himself from voting on the amendment, Mankins violated California conflict in interest law, denied the Ranch Company the due process and equal protection of the law guaranteed by the United States and California constitutions, and deprived the Ranch of its civil rights under 42 U.S.C. § 1983.

In its motion, the Ranch presents alternative prayers for relief. The primary relief sought is an order that Mankins' vote was invalid and of no legal force and effect; the December 14, 1981 vote, after Mankins' illegal vote is voided, was two in favor of sustaining the Planning Commission action amending the General Plan to permit a recreational use of 630 acres of the Ranch property and two opposed; and therefore, the 2-2 vote affirmed the Planning Commission action, and the present General Plan designation of the 630 acres in question is Recreation. Plaintiff's alternative plan seeks an invalidation of the entire September 22 and December 18, 1980 (the votes which changed the prior L Recreation zoning of the Ranch Co. property to the Rural Lands land use category), *and* the December 14, 1981 votes of the Board because of the taint of Mankins' disqualification, plus appropriate litigation expenses under 42 U.S.C. § 1988.

It is undisputed that Supervisor Mankins was a member of the Cal-Shasta Club since 1979. However, did Mankins' membership present a conflict of interest when he voted on the Ranch's proposed amendment to the 1980 General Plan? Plaintiff contends that the membership created a financial

conflict of interest which prevented him from legally voting on December 14, 1981. California Government Code § 87100 provides:

> No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest.

The Code further provides:

> An official has a financial interest in a decision within the meaning of Section 87100 if it is reasonably forseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on:
>
> . . .
>
> (b) Any real property in which the public official has a direct or indirect interest worth more than one thousand dollars ($1,000);
>
> . . .(Gov't. Code § 87103).

Plaintiff contends that as a member of Cal-Shasta, Mankins owns a cabin, boat dock, and has an interest in the common realty of the Club bringing him well within the operative scope of the "real property" requirement. Plaintiff contends that a membership at Cal-Shasta is worth approximately $10,000. Thus, Plaintiff argues that because of Supervisor Mankins' undisclosed financial conflict of interest he was disabled from voting on Ranch's proposed amendment at the December 14, 1981 meeting.

Under California Gov't. Code § 91003, a court may set an official action aside as void if it decides that a conflict violation has occurred. Plaintiff contends that the effect of the court's invalidating Mankins' vote would be to *affirm* the Planning Commission decision amending the General Plan to permit a recreational use on the Ranch property. Without Mankins' vote, a 2-2 vote would result, and Plaintiff argues that a tie vote acts to *affirm* the decision of the lesser tribunal agency (here the Planning Commission); thus, the 2-2 vote

approved the modification of the General Plan sought by Ranch Co.

The County offers four independent legal grounds which support judgment on behalf of the County:

1. The County cannot be liable under 42 U.S.C. § 1983 for Mankins' alleged action as such action was not undertaken pursuant to a County policy or custom.

2. It is not a due process violation for a legislator to vote on a legislative matter under circumstances which result in a conflict of interest.

3. The California Political Reform Act of 1974 provides a statutory remedy for the alleged conflict of interest violation, providing due process for the plaintiff.

4. An analysis of Mankins' alleged ownership interests shows that he did not have a financial interest of the type which constitutes a conflict of interest.

A. ADEQUATE STATE REMEDIES

The Court believes that the County's *strongest* argument for summary judgment is that the California Political Reform Act of 1974 provides a statutory remedy for the alleged conflict of interest violation, thereby providing due process for the Plaintiff. In *Parratt v. Taylor*, 451 U.S. 257 (1981), a prisoner sued the warden over loss of a $23 hobby kit under § 1983. The Court held in favor of the warden and held that the existence of state tort claims procedure supplied due process of law and thus no federal claim could be presented. The *Parratt* principle was extended to *intentional* taking of property in *Palmer v. Hudson*, 104 S.Ct. 3194 (1984). The Court held that no due process violation had occurred since even if the prisoner's property had been destroyed, it was not taken "without due process of law" since an alternative post-deprivation remedy existed under state law. There is still some question as to whether *Parratt* should be extended to

include *substantive* due process violations, in addition to procedural due process violations.

However, in the instant action, the *Parratt* and *Palmer* cases seem to be directly applicable. Plaintiff is complaining that its *procedural* due process rights were violated by the Board of Supervisors' vote since Mankins was financially biased. Thus, presuming that Supervisor Mankins did, indeed, have a conflict of interest when he voted, California state law *does provide* a process to remedy that violation. The Political Reform Act authorizes any individual within the jurisdiction to bring a civil action to request the court to set aside an official action if a violation of the Act has occurred and the action complained of would not have occurred without that violation. (Gov't. Code § 91003). This process may remedy any harm suffered by the Plaintiff; thus, under *Parratt* and *Palmer*, there is no basis for Plaintiff to bring a § 1983 claim in federal court. The remedial process provided to the Plaintiff in the Political Reform Act satisfies all of the constitutional requirements of due process. Thus, the court hereby disposes of Plaintiff's procedure due process claim against the County.

B. OFFICIAL POLICY OR CUSTOM

The court believes that the Defendant poses another strong legal argument in its behalf. Regardless of the presence or absence of any conflict of interest on the part of Supervisor Mankins; or whether a due process violation even occurred, the County *cannot* be held liable for that violation under § 1983 *unless* it was the result of a policy or custom of the County. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). *Monell* also held that the theory of *respondeat superior* cannot be used to hold a governmental entity liable under the statute. *Id.* at 691.

In the instant action, Defendant contends that the undisputed facts demonstrate that the County does not have a policy or custom of allowing participation in decisions by financially

interested officials. In 1976, the County Board of Supervisors adopted Resolution No. 76-456 by unanimous vote, which established the official County policy to require a member of the Board of Supervisors to disqualify himself from participating in a decision when he has a conflict because of a financial interest. Nor is there any evidence to suggest that the County had an unofficial policy of *ignoring* the official policy.

Instead, the evidence shows that Supervisor Mankins filed disclosure statements as required by the official policy (and by state law) each year. Until 1982, Mankins had never reported any of his interests in the Cal-Shasta Club on his yearly disclosure statements, and had never spoken to any County employee about those interests or any potential conflict of interest raised by those interests (Mankins' deposition).

In *White v. Washington Public Power Supply System*, 692 F.2d 1286, (9th Cir. 1982), the Court stated that in a § 1983 case:

> [T]here must be a showing either of official sanction of the agent's acts, or of culpable negligence, or impliedly or tacitly authorized, approved, or encouraged . . . conduct as a matter of course on the part of the employer in failing to correct known . . . acts of its employees.

Defendant contends that the County here did not meet even the minimal participation level for liability — tacit authorization of the alleged act — as it was not even aware of Supervisor Mankins' connection with Cal-Shasta or alleged ownership interests. Furthermore, Mankins' Statements of Economic Interests filed since 1974 contain a declaration under penalty of perjury that he had disclosed all reportable financial interests are not reported on those documents. Thus, it appears that if Mankins did have a conflict of interest as alleged, his participation in the decision pertaining to Ranch land use was in direct violation of the County's policies and customs. Plaintiff has presented no evidence to prove that the County had knowledge of Mankins' alleged conflict of interest.

(Uncontroverted Fact 68.[2])

Furthermore, in Plaintiff's complaint, there is *no allegation* that the County had a policy (official or unofficial) or custom of allowing participation in decisions by financially interested officials. Neither is there an allegation that the County "tacitly authorized, approved, or encouraged" such conduct.

In response, Plaintiff does not contend that the County had a policy of allowing financially biased Supervisors to vote. Rather, Plaintiff contends that the policy complained of is the Supervisors' *refusal* to amend the General Plan. In other words, the *result* of the biased voting was an official policy; therefore; the *Monell* test is satisfied.

However, the court finds Plaintiff's application of *Monell* to the facts of this case to be unpersuasive. The act complained of is really Mankins' conflict of interest which *resulted* in the alleged denial of Plaintiff's due process. Plaintiff's argument that Mankins' vote was performed in the presence of the entire Board of Supervisors, and this somehow created "official policy" is unacceptable; of course, the County knew that the Board of Supervisors had voted; it did not, however, know that one of the supervisors had a membership at Cal-Shasta. The County had a policy which sought to eliminate supervisors' conflicts of interest. Just because *one* of the supervisor's allegedly violated his duty to disclose his financial interest, does not mean that the County should be held liable. *Monell* is clear in its holding that there must be *some* sort of "guilty conduct" by the County — not just conduct by an individual who works for the County. Thus, since the County did not have any custom or policy that led to any deprivation

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[2] Plaintiff attempts to impute knowledge to the County of Mankins' interests in Cal-Shasta because taxes on the cabin's improvements were paid from "the Howard Mankins Investment Fund" beginning in tax year 1979-1980. However, the County tax assessment roll indicated that Leo Brisco was the *legal owner* of the property at all pertinent times, and the payment of taxes from an "Investment Fund" bearing Supervisor Mankins' name *should not* be deemed knowledge on the part of the County as to a potential conflict of interest.

of constitutional rights under § 1983, judgment should be granted in favor of the County.

C. LEGISLATIVE MATTER

Defendant further argues that it is not a due process violation for a legislator to vote on a legislative matter under circumstances which result in a conflict of interest. Defendant distinguishes legislative proceedings from adjudictory [*sic*] proceedings and contends that the concept of a "fair" hearing is only relevant to adjudicatory proceedings and not to informational hearings in the legislative process. Plaintiff contends that an act in violation of the 5th Amendment's due process guarantee cannot be sterilized by affixing any particular label to the act. The Supreme Court, in *Hortonville Joint School District No. 1 v. Hortonville Education Assn.*, 426 U.S. 482 (1976), stated that "determining what process is due in a given setting requires the Court to take into account the individual's stake in the decision at issue as well as the State's interest in a particular procedure for making it." Thus, in the instant action, the court would need to examine the "setting" to determine whether the alleged conflict of interest violated due process. However, the court feels that it is unncessary [sic] to rule on this argument since Defendant's motion can be granted on either of the two alternative grounds stated above.

D. CONFLICT OF INTEREST

Defendant's final argument in support of its motion for summary judgment is that Mankins *did not* have a conflict of interest disqualifying him from participating in matters relating to Ranch property. Defendant contends that the only ownership interest which Mankins undisputably *did* have at the times in question was his membership in Cal-Shasta. Defendant argues that this interest did not trigger the disqualification requirement as Cal-Shasta is a non-profit corporation and thus not a "business entity." (Gov't. Code § 82005)

Defendant also states that the right to use a specific site on Cal-Shasta's property (comes with the membership) is not a sufficient "interest in real property" to require disqualification. Furthermore, at the time of voting on the matters pertaining to the Ranch Company, Mankins did not own the improvements on the Cal-Shasta site; they were still owned by his uncle, Leo Brisco. It is even questionable whether "improvements" constitute "real property."

Plaintiff analyzes the disqualification language differently (§ 87103) and asserts that Mankins had an interest in real property, "direct" and "indirect", worth more than $1,000, to wit, about $10,000 (this figure does not include the value of the cabin acquired from his uncle). However, Plaintiff also asserts that by December 14, 1981, Mankins, in fact, *did* own the cabin. Plaintiff mainly relies on its contention that the value of a Cal-Shasta membership is approximately $10,000 (this figure is based on how much memberships are typically sold for). Defendant asserts that the Plaintiff's evidence goes only to the value of such a membership in *1983* — not 1980 or 1981.

The parties also disagree on what the *effect* of Mankins' voided vote would be on the land. Plaintiff asserts that a 2-2 vote would mean that the Planning Commissions's *decision* to amend the General Plan would stand. Defendant asserts that the Planning Commission acts only as an *advisory* body in this context, and a General Plan amendment may be enacted only by the affirmative vote of *three members* of the Board of Supervisors. Thus, the effect of a 2-2 vote would be to *retain* the property as a Rural Lands designation rather than allowing the Planning Commission's decision to stand. However, the Court finds it unnecessary to address these underlying issues since Plaintiff cannot prevail under a § 1983 cause of action under either *Monell* or *Parratt*.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's motion for summary judgment as to the "taking" cause of action is GRANTED. Further, Defendant's motion for summary judgment as to the due process cause of

action is GRANTED. Conversely, Plaintiff's motion for partial summary judgment is DENIED.

DATED: OCTOBER 21, 1985

/s/ CONSUELO B. MARSHALL, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAKE NACIMIENTO RANCH
PLAINTIFF(S)

VS

COUNTY OF SAN LUIS OBISPO
DEFENDANT(S)

CASE NUMBER CV 82-2932 CBM
NOTICE OF ENTRY

TO THE ABOVE NAMED PARTIES AND TO THEIR ATTORNEY(S) OF RECORD:

You are hereby notified that JGMNT & ORD that deft's motion fr S/J as to "taking" cause of action & as to due process cause of action GRANTED; pltf's motion for partial S/J DENIED in the above entitled case was entered in the docket on 10-24-85.

You are also notified that if this case was tried and you introduced exhibits into evidence, they must be claimed at this office *after* the expiration of thirty days from the receipt of this notice. (After *sixty* days in cases in which the United States, its officers or agencies were parties) Unless they are claimed within thirty days after the expiration of the above period, they will be destroyed pursuant to Local Rule 29.2. If an appeal is taken they will, of course, be held until the Appellate Court finally determines the matter. Exhibits which are attached to a pleading will not be destroyed but will remain as a permanent record in the case file.

CERTIFICATE OF MAILING

I, Clerk of the United States District Court, Central District of California, and not a party to the within action, hereby certify that on 10-24-85, I served a true copy of this notice of entry on the parties in the within action by depositing true copies thereof, enclosed in sealed envelopes, in the United States Mail in the United States Post Office mail box at Los Angeles, California, addressed as follows:

THOMAS GREEN
615 So. Flower St
Ste 1201
LA Ca 90017

JERRY FADEN [*sic*]
FADEN BERGER & NORTON
501 Santa Monica Blvd
Ste 600
Santa Monica Ca 90406

CLERK, U.S. DISTRICT COURT
By /s/ William Horrell
Deputy Clerk

NOTICE

IN ACTIONS ARISING UNDER THE ECONOMIC STABILIZATION ACT, THE EMERGENCY PETROLEUM ALLOCATION ACT, AND THE ENERGY POLICY AND CONSERVATION ACT, NOTICES OF APPEAL TAKEN FROM THIS JUDGMENT MUST BE FILED IN THE TEMPORARY EMERGENCY COURT OF APPEALS IN ACCORDANCE WITH THE RULES OF PROCEDURE OF THAT COURT.

APPENDIX E

COUNTY SEAL

SAN LUIS OBISPO COUNTY
PLANNING DEPARTMENT
County Government Center
San Luis Obispo, California 93408
(805) 549-5600

Paul C. Crawford, AICP
Planning Director

DATE: APRIL 9, 1984

TO: JAMES LINDHOLM, COUNTY COUNSEL

FROM: BRYCE TINGLE, SENIOR PLANNER

VIA: PAUL C. CRAWFORD, PLANNING DIRECTOR

SUBJECT:

ECONOMICALLY VIABLE USES OF THE LAKE NACIMIENTO RANCH CO. PROPERTY

In response to Interrogatories 35 and 36 the County contends the following uses, or combination of uses, could be economically viable on the Lake Nacimiento Ranch Co. property (the Land Use Element definitions of each use are found in Attachment A):

1. Livestock Specialities [*sic*]
2. Nursery Specialties
3. Off-Road Vehicle Courses
4. Rural Sports and Group Facilities
5. Domestic Animal Raising
6. Mobile Home Dwellings
7. Residential Accessory Uses
8. Single Family Dwellings
9. Crop Production and Grazing
10. Mining
11. Petroleum Extraction

Staff has reviewed this list and further narrowed it down, focusing on: (a) the types of uses that could provide the highest possible economic return for the least amount of improvement costs; and (b) those uses that could reasonably be established on the Ranch and for which staff could recommend approval. These criteria would *rule out* the following uses (not as *allowed* uses - simply as principal uses that could, in themselves be economically viable):

1. Nursery Specialities - the Ranch Co. property is so remote from product marketplaces as to realistically exclude such uses.

2. Off-Road Vehicle Courses - staff could not recommend this use because of its potential for very substantial adverse environmental impacts on the natural terrain and resulting adverse impacts on the water quality of Lake Nacimiento due to soil erosion and sedimentation.

3. Domestic Animal Raising - by its very definition this use is intended to be oriented to low-key, non-commercial raising of animals incidental to a residential use, thus resulting in little if any economic value for the Ranch Co. property.

4. Residential Accessory Uses - this use group includes only uses that are incidental to residential uses of the property, thus having no real economic value on their own.

5. Mining - any mining that could be expected to provide a commercial financial return would be a discretionary use subject to the requirements of the County Land Use Ordinance Sections 22.08.180 - Surface Mining and Reclamation, and 22.08.190 - Undergound [*sic*] Mining. Because of the potential for significant adverse impacts on the Ranch Co.

property, and the unsuitability of the road network from the county road to the Ranch Co. property for handle mining-related traffic, and the potential for adverse impacts on lake water quality, staff could not recommend approval of such a use.

6. Petroleum Extraction - to staff's knowledge the area is not known to contain likely petroleum resources, so this use cannot now be considered economically viable for the Ranch Co. property.

Of the remaining uses, two need further clarification. For all practical purposes staff feels there is little if any difference between Mobile Home Dwellings and Single Family Dwellings. Each use focuses primarily on the type of residential unit, mobile home vs. conventional "stick-built" construction. There may be some difference in economic viability between mobile homes and conventionally built homes (a higher price for a large custom built home), but the type of use occurring with either is a residence. However, the following analysis will evaluate each type of residence as a separate use.

Therefore, the list of economically viable uses that could potentially be developed on the Ranch Co. property include the following:

1. Livestock Specialties - Intensive
2. Rural Sports and Group Facilities
3. Single Family Dwellings
4. Mobile Home Dwellings
5. Crop Production and Grazing

* * *

ECONOMICALLY VIABLE USES

The following discussion outlines the types of potential developments that could occur on the Lake Nacimiento Ranch Co.

property that staff could recommend for approval.

1. This use group is an allowed special "S-3" use in the Rural Lands category, subject to the requirements of LUO Section 22.08.052. This use could include such things as horse breeding operations, beef and dairy feedlots, fowl and poultry ranches, or hog ranches, all requiring a discretionary Development Plan approval by the Planning Commission.

   The minimum site area required is 20 acres, except 5 acres for fowl and poultry ranches. The LUO also contains a number of special standards to be met, but those standards can be waived by the Planning Commission. Access is to be by an all-weather road, but this too could be waived.

   A large horse breeding and training operation, Cardiff Stud Farms, has been approved and is under construction on 74 acres of a 895 acre ranch north of Creston. Another similar operation, LASMA Corp, is proposed on 450 acres south of Creston and the Development Plan application is currently being processed.

   Staff could recommend approval of such Development Plan uses on the Ranch Co. property if adequate mitigation measures are developed through the environmental review process.

2. Rural Sports and Group Facilities

   This use is an allowed special "S-4" use in the Rural Lands category, subject to the requirements of LUO Section 22.08.072, and includes the following types of possible development.

a. Incidental Camping (LUO Section 22.08.072a)

Each existing parcel can be developed with 10 or fewer tent camping spaces or self-contained recreational vehicle spaces, without utility hookup facilities. These facilities would be allowable upon approval of a ministerial Site Plan land use permit. The application would be subject to standards requiring 1,000 foot setbacks from any property lines, usable parking area, all-weather access to the site and restroom facilities as required by the Health Department. More than 10 camping spaces would be allowed with approval of the Development Plan land use permit, subject to the finding set forth in LUO Section 22.08.0721(11).

Staff could recommend approval of the Development Plan for more than 10 unites, subject to proper mitigation measures being developed in the environmental review process.

b. Organizational Camps (LUO Section 22.08.072a)

Permanent organizational group camps are allowable for organizations such as churches, youth groups, or corporations. Cabins, meeting halls, swimming pools, restroom facilities and accessory buildings are allowable in addition to tent camping areas, subject to Development Plan approval by the Planning Commission. Density and parking improvements are to be established through the Development Plan, with an allowable maximum of one camping unit per acre. The LUO requires that all-weather access be provided to the site. Also, since a group camp is a discretionary approval, any number of camp sites for self-contained recreational vehicles might be approved by the Planning Commission. Staff could recommend approval, subject to adequate mitigation measures from the environmental determination.

c. Dude Ranch (LUO Section 22.08.072b)

A dude ranch could be established subject to a discretionary Development Plan approval by the Planning Commission. Guest lodging facilities can be attached, motel-type units or detached cabins, provided they include no cooking or eating facilities. The density of guest units is to be set by the Planning Commission, not to exceed one guest unit per five acres. There may be common eating and drinking and recreational facilities for use by guests only.

A minimum site area of 160 areas is required, except that where a proposed facility has obtained a recorded right of access and use of adjoining property for recreational purposes, the Planning Commission may reduce the minimum site area as part of the Development Plan approval. While a dude ranch would be subject to the standards in Chapter 22.08 of the Land Use Ordinance, those standards could be modified or waived by the Planning Commission with Development Plan review, subject to the finding that the conditions of the site and/or vicinity make a subject standards unnecessary or ineffective. The above mentioned minimum site area limitation, or a coverage limitation of 2% of the total size area, for instance, could be modified. Staff could recommend approval with adequate mitigation measures.

d. Equestrian Facilities (LUO Section 22.08.072c)

Equestrian facilities engaged in the boarding of horses, riding schools, stables and exhibition facilities could be established on the property. Board stables require only a ministerial Plot Plan approval, whereas riding academies and exhibition facilities would require Development Plan approval. The minimum site area required is 10 acres. Staff could recommend approval of such uses.

e. Health Resort (LUO Section 22.08.072d)

Commercial health resorts and transient lodging facilities accessory to the use would be allowable by Land Use Ordinance Section 22.08.072d, subject to a Development Plan land use permit approved by the Planning Commission. With some parcels having access to Lake Nacimiento, the environment conducive to a health resort appears to be available for a guest facility on the Ranch Co. property. There are no specific density or minimum site area limitations associated with this use, however, there could be a review of these aspects since the required Development Plan permit is discretionary and subject to partial approval, approval with conditions or denial. The county is currently processing a Land Use Element amendment that, if approved, would enable subsequent approval of an executive resort with lodging and recreational facilities, including an 18-hole championship golf course on a 2,200 acre property south of Creston. Staff could recommend approval of such a use on the Ranch Co. property with adequate mitigation measures.

f. Hunting and Fishing Clubs (LUO Section 22.08.072e)

Hunting and fishing clubs are allowable with ministerial approval of a Site Plan land use permit, subject to standards limiting hunting and fishing to areas no closer than one-half mile from any residential category or residential use outside the applicant's ownership, with setbacks of 1,000 feet from any property line also required. Camping associated with the use is allowable with the requirements explained in item 2a above.

g. Sport Shooting Facilities (LUO Section 22.08.072f)

Outdoor sport shooting facilities are allowable with Development Plan approval by the Planning Commission required, subject to location and noise standards in LUO Section 22.08.072f. Staff could recommend approval with adequate mitigation measures.

3. Single Family Dwellings

As noted previously, both Single Family residences and Mobile Homes could be developed on Ranch Co. property. Single Family Dwellings are allowable "A" uses in the Rural Lands category. Under LUO Section 22.04.082, the density of units in the Rural Lands category is "two for each area equivalent to the minimum parcel size or fraction thereof required by Section 22.04.020 (Parcel Size)." Considering the Ranch Co. property as a single 1,539 acre parcel, staff estimates the minimum parcel size would be 160 acres, thus allowing a total of ten (10) residences to be built on the Ranch, subject to securing proper building permits, with ministerial approval only.

4. Mobile Home Dwellings

Mobile Home dwellings are allowable special "S-8" uses in the Rural Lands category, subject to the requirements of LUO Section 22.08.162 - Individual Mobile Homes. Each mobile home would have to be on a lot at least 2-1/2 acres in size. Assuming the Ranch Co. property consists of nine parcels, a minimum total of 18 mobile homes could be established, two on each parcel, subject only to Plot Plan approval if the parcel is 10 acres or larger or Development Plan approval if the parcel is less than 10 acres.

5. Crop Production and Grazing

This use group is an allowable "A" use in the Rural Lands category. The property owners previously testified before the San Luis Obispo County Assessment Appeals Board that the Ranch has been sued for grazing operations and that grazing was the "highest and best use" of the Ranch Co. property in an attempt to have the property tax assessment reduced.

a. Present Situation. In its present configuration, the economic viability of the Ranch Co. property for grazing or other agricultural uses could be enhanced if the property was granted agricultural preserve status and a Williamson Act Contract recorded on the property. Under the County's present Rules of Procedure the property would qualify for ag preserve status because it is over 100 acres in size, without having to show any economic return for ag uses on the property. If the owner applied for and received preserve status and recorded a contract prior to March 1, 1985, the property taxes would be reduced by the County Assessor effective 1985. The contract term would normally be twenty (20) years, automatically renewing each year unless the owner filed a notice of non-renewal that would then take ten (10) years to run out.

Whether agricultural uses other than grazing could successfully be undertaken on the property is unknown. However, northern San Luis Obispo County has experienced substantial growth in the wine industry in recent years. There are presently over twenty (20) wineries in the north county, many of them in the area between Lake Nacimiento and Paso Robles or to the southeast of the lake towards Templeton. The property may be suitable for vineyard development, however, this would depend on a thorough analysis of soil conditions, micro-climates and development of adequate water supplies for such

development. It's also conceivable that other crops might be satisfactorily developed on the Ranch.

As noted previously in the discussion of Single Family Dwellings a total of ten (10) residences could be built on the property, subject to securing a building permit for each from the County. In addition to those 10 residences, farm support quarters could be developed on the Ranch in accordance with LUO Section 22.08.034b - Farm Support Quarters. The allowable density for farm support quarters is as follows (22.08.034b(4)):

(i) First unit. One dwelling for farm support is allowed for an area equivalent to the minimum parcel size required by Section 22.04.020 et seq. (Parcel Size) or fraction thereof.

(ii) Additional units. Two additional dwellings are allowed for each area equivalent to the minimum parcel size (Section 22.04.020 et seq.) or fraction thereof in addition to the minimum area required for the first farm support unit. [Amended 1981, Ord. 2063]

The potential number of farm support quarters to be 21 unites. Therefore, the total combined number of potential residences on the 1,539 acre Ranch is 31 dwellings. If mobile homes were the primary residences (totalling nine), a total of 30 potential residences could be established.

b. Parcelization for Agricultural Intensification.

One of the commonly offered rationales for breaking down large land holdings is the high cost of developing economically viable agricultural uses; new owners of smaller parcels will bring new capital to use for development of new agriculture or intensification of existing

agricultural operations. Such an approach to the Ranch Co. property could occur as follows:

First, nine legal parcels could be created through the previously described Certificate of Compliance and Lot Line Adjustment processes. Each of those parcels could then be marketed for sale for agricultural development. Each of those parcels could also qualify for primary residences, as well as possible farm support quarters. In addition, the Lot Line Adjustment could create all parcels so as to be at least 100 acres in size, thereby making them eligible for ag preserve status and Williamson Act contracts that could substantially reduced [*sic*] the property tax burden to the new owner of each new "ranch".

Either of the scenarios described in A and B above could result in an economically viable return to the present Ranch Co. ownership through development or sale of some of [*sic*] all of the property. It should also be noted that virtually all of the actions could be accomplished through ministerial permits granted by the County, thereby avoiding costly road improvements from the property back to the nearest County road. Approval of agricultural preserves must be granted by the county Planning Commission and the preserve contracts must be approved by the Board of Supervisors, and it is likely they would be approved since the county actively encourages property owners to participate in the ag preserve program.

Supreme Court, U.S.
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No. 87-2104 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LAKE NACIMIENTO RANCH CO.,
A California Limited Partnership,

Petitioner,

vs.

COUNTY OF SAN LUIS OBISPO, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case does not present the questions posed by Petitioner. The only questions presented are the following:

1. Can a landowner's claim that a general plan and zoning ordinance, which permits multiple uses, violates the Taking Clause *as applied* to its 1500-acre property be ripe for adjudication where (1) the landowner has never applied for any development under the zoning in question and (2) has presented no evidence that such application would be futile?

2. Can a landowner establish a *facial* Taking Clause claim that a general plan and zoning ordinance deprived it of all economically viable use of its 1500-acre property without evidence that no uses or combinations of uses under the zoning are economically viable?

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No. 87-2104

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

LAKE NACIMIENTO RANCH CO.,
A California Limited Partnership,
Petitioner,
vs.
COUNTY OF SAN LUIS OBISPO, CALIFORNIA,
Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

In this action, petitioner sought declaratory and injunctive relief, as well as damages under 42 U.S.C. § 1983, on the theory that the County of San Luis Obispo's ("County's") 1980 General Plan and Land Use Ordinance had deprived its property of all economically viable use in violation of the Fifth and Fourteenth Amendments of the United States Constitution.[1]

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[1] In the courts below, petitioner also sought relief on a procedural due process theory based upon an alleged conflict of interest of a member of the County Board of Supervisors. Petitioner has abandoned the due process claim in its petition; it seeks certiorari only on the taking claim.

The District Court granted the County's motion for summary judgment in an unpublished opinion (Appendix D to Petition for Certiorari). The Ninth Circuit affirmed in an opinion reported at 830 F.2d 977 (Appendix A to Petition), and subsequently modified its decision in an opinion reported at 841 F.2d 872 (Appendix B to Petition). It also denied petitioner's petition for reconsideration and suggestion for rehearing en banc (Appendix C to Petition).

A. The 1980 General Plan and Land Use Ordinance.

California law requires each county to develop and maintain a comprehensive long-term General Plan for development, including a Land Use Element, which describes the County's official policy on the location, growth and development of land uses. Cal. Gov't Code § 65302.[2] The County's zoning ordinance (now called Land Use Ordinance) states its development standards and review procedures.

In 1980, the County amended the Land Use Element ("LUE") of its 1971 General Plan and its Land Use Ordinance ("LUO"). These amendments (the "1980 LUE/LUO"), which affected the Lake Nacimiento area in which petitioner's property lies, are the target of petitioner's taking claim.

Lake Nacimiento, an artificial reservoir created in 1960 to serve agricultural needs, lies in a remote area in northern San Luis Obispo County. Development has taken place since the creation of the lake, but in 1980 the economy of the region was still based upon agriculture, principally grazing and dry farming.

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[2] California code sections of particular pertinence are contained in Appendix C hereto. Relevant extracts of the County's 1980 General Plan and ordinances are contained in Appendices A and B. Additional portions of those documents were appended to the County's brief in the Ninth Circuit.

In 1980, public services around the lake, such as fire and police protection, were minimal, no public medical facilities existed within 25 miles, and roads and domestic water supplies were inadequate for estimated future needs. The County's tax base for financing new public services was limited. The County was also concerned about potential environmental damage to the lake and its watershed from further development.

To slow development until these problems could be solved, the 1980 LUE/LUO reduced the residential densities previously allowed for the existing developments around the lake and reclassified most of the remaining privately owned, undeveloped land from an "L (Recreation)" zone to a "Rural Lands" category.

The Rural Lands category, like the L (Recreation) zone, permitted single-family residences (increased to two per parcel) and light agricultural uses as a matter of right. In all, the Rural Lands category contains 8 *groups* of uses allowed as of right and 42 *groups* of special uses (allowable subject to special standards and/or processing requirements; South Shore standards restrict 12 of the 42 groups of special uses). See Appendix A. Each group may include multiple individual uses. For example, the "Rural Sports and Group Facilities" group includes hunting and fishing clubs, dude ranches, health resorts, recreational camps, group camps, and equestrian facilities.

B. Petitioner's Property.

Petitioner's approximately 1,500 acres on the south shore of Lake Nacimiento (the "South Shore Property") are part of an approximately 3,000-acre tract on the north and south shores purchased by its partners and their ancestors in 1964 (CR 140). Part of the tract was sold, and the remaining property is held in two limited partnerships (CR 124, Exs. V, G & H).

The South Shore Property has nine legal parcels (CR 124, Ex. K). There are no improvements other than a small corral and cattle-loading facility, worth about $100, and a one-lane "chip and seal" road (CR 124, Exs. V, W).[3] Petitioner's investors acquired the South Shore Property for investment, and the only use to which they have ever put the property since 1964 is to hold it for investment and to lease it in the interim for livestock grazing and equestrian purposes (CR 124, Ex. V).

Under the 1980 General Plan, the South Shore Property is primarily Rural Lands, except for a small parcel designated Recreation. In 1981, petitioner applied for a general plan amendment to place approximately 800 acres in the Recreation category (CR 39). The Planning Commission recommended approval for 630 acres, but after public hearing, the Board of Supervisors denied the application (*id.*).

At no time did petitioner or its predecessors present the County with an application to develop the property under the Rural Lands category (CR 124, Exs. V, W).

When petitioner's investors formed their limited partnership in 1975, they valued the South Shore Property at $521,000 (CR 124, Ex. G). Petitioner admitted that between 1975 and the time of the alleged taking, it only expended $66,565 on taxes and other expenses, and that it sold part of the property for $50,000 and received grazing lease income of $6,100 (CR 124, Ex. W).[4] It also admitted that the South Shore Property had a market value of $992,500 immediately following the

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[3] The North Shore portion of the property acquired in 1964, on the other hand, has been fairly intensively developed. Petitioner's investors received substantial income from a sale of a portion of this property, and the remaining property is zoned for uses that include multi- and single-family housing, marinas, theaters, swim and tennis clubs, and commercial and retail uses, among others (1980 LUE/LUO).

[4] In 1983 petitioner also obtained $500,000 in a refinancing of the property (*id.*, Ex. I).

alleged taking (giving petitioner a potential profit of $461,035 over the 1975 investment value), and that by March 1984 the market value of the property had increased to $1,740,000 (over three times the amount of its 1975 investment value) (*see* CR 124, Ex. U).

REASONS FOR DENYING WRIT

The principal reasons why this Court should not grant certiorari in this case are that

(1) while petitioner poses some interesting abstract questions for the Court to answer, those questions are not presented by this case; and

(2) the claimed conflicts between the decisions of this Court and the Ninth Circuit, or between those of the Ninth Circuit and other circuits, simply do not exist.

This case, therefore, does not meet any of the "special and important reasons" set forth in Supreme Court Rule 17 for granting certiorari.

What petitioner has requested of this Court is to issue an advisory opinion on the parameters of taking claims. To comply would contravene the constitutional and policy prohibitions on the issuance of advisory opinions,[5] as well as the important policy laid down by this Court through decades of experience, that the decision of whether a regulation constitutes a taking can only be made after a careful analysis of the facts of each case. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). That policy is of particular importance here, where the sole ground

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[5] As this Court stated in *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969): "We do not sit, however, 'to decide abstract, hypothetical or contingent questions . . . or to decide any constitutional question in advance of the necessity for its decision . . . .'"

of attack was on the economic viability of remaining uses,[6] an inquiry unique to the facts of each case.

The springboard for all petitioner's questions is its assertion that the undisputed evidence established that no economically viable use exists on its property under Rural Lands. Petitioner doubtless makes that assertion to suggest the existence of substantial, unresolved federal issues, but the assertion is false. There was, indeed, uncontradicted evidence of economically viable use, and it was petitioner's failure to introduce controverting evidence that caused both courts below to subject petitioner's facial claim to summary judgment.

As to petitioner's as-applied attack, the Ninth Circuit properly determined that the claim was premature. Notwithstanding petitioner's incorrect argument that the Ninth Circuit has applied ripeness rules more rigidly than is warranted by decisions of this Court, the challenge is premature under this Court's standards, because petitioner never made any application for development under Rural Lands, and it submitted no evidence that such an application would be futile. Finally, even had its as-applied claim been decided on the merits, both courts below correctly found that the evidence failed to present a triable issue as to deprivation of all economically viable use.

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[6] Petitioner did not and does not claim that the 1980 LUE/LUO fails to advance a legitimate state interest. Those amendments have previously been held constitutional in *Cormier v. County of San Luis Obispo*, 161 Cal. App. 3d 850, 207 Cal. Rptr. 880 (1984).

The Ninth Circuit did not address the other arm of the ripeness analysis, availability of an adequate state remedy, presumably because "at the time of the taking" California did not permit recovery of damages in regulatory taking cases. *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108, 3121 (1985); *see First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. ___, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987); *Austin v. City and County of Honolulu*, 850 F.2d 678, 681 (9th Cir. 1988); *Baker v. Burbank-Glendale-Pasadena Airport Authority*, 39 Cal. 3d 862, 867 n.4, 705 P.2d 866, 218 Cal. Rptr. 293 (1985).

A. THE AS-APPLIED CHALLENGE WAS PROPERLY HELD TO BE PREMATURE UNDER THIS COURT'S SETTLED STANDARDS.

Petitioner claims that the Ninth Circuit too rigidly applied the ripeness tests of *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), and *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), by requiring it to apply for a development plan and to seek a waiver or variance to achieve ripeness.

Petitioner misconstrues the relevant authorities. This Court stated in *Williamson County* that "[a]s the Court has made clear in several recent decisions, a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." 473 U.S. at 186.[7]

The Court referred to *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264 (1981), in which it rejected an as-applied claim as premature because:

> "There is no indication in the record that appellees have availed themselves of the opportunities provided by the Act to obtain administrative relief by requesting either a variance from the approximate-original-contour requirement of § 515(d) or a waiver from the surface mining restrictions in § 522(e). If appellees were to seek administrative relief under these procedures, a mutually acceptable solution might well be

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[7] A zoning ordinance, by its nature, is usually applied to a piece of property when the owner applies for development under that ordinance. The usual as-applied zoning challenge thus differs from other kinds of as-applied regulatory challenges, which arise when government attempts to *enforce* the regulation against the individual. *See, e.g., Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

> reached with regard to individual properties, thereby obviating any need to address the constitutional questions." *Hodel*, 452 U.S. at 297 (footnote omitted).

Similarly, in *Agins v. City of Tiburon*, 447 U.S. 255 (1980), the Court held that an as-applied challenge to a zoning ordinance was not ripe because the property owners had not yet submitted a plan for development of their property.

Williamson County ruled that the owner's claim was in a posture similar to that in *Hodel*:

> "Respondent has submitted a plan for developing its property, and thus has passed beyond the *Agins* threshold. But, like the *Hodel* plaintiffs, respondent did not then seek variances that would have allowed it to develop the property according to its proposed plat . . . . It appears that variances could have been granted to resolve at least five of the Commission's eight objections to the plat.
>
> ". . . Absent a final decision regarding the application of *all* eight of the Commission's objections, it is impossible to tell whether the land retained any reasonable beneficial use . . . ." 473 U.S. at 187-188 & n.11 (emphasis in original).

MacDonald, Sommer & Frates held the claim there was premature despite the rejection of a development plan for intensive residential development, because that denial did not preclude the availability of less intensive, but still valuable, development, 106 S. Ct. at 2568 & n.8. As the Court stated: "Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable review." *Id.* at 2569, n.9.

In this case, unlike the owners in *Williamson County* and *MacDonald, Sommer & Frates*, petitioner never "passed beyond the *Agins* threshold" because it never applied for any development plan, formal or informal, under Rural Lands.

As petitioner correctly notes (pp. 19-20), the only application it ever made was its 1981 application for an amendment of the General Plan and LUO to rezone 800 acres to Recreation, a different land use category. That application, as petitioner also correctly notes, simply has no bearing on the issue of what development the County might or might not permit under the Rural Lands category.

The "informal proposal"[8] provided with the amendment application contemplated using the property as a recreational vehicle ("RV") park, which is not a permissible use under Rural Lands (see Appendix A). While California law gives the County the power to grant many waivers and variances, it prohibits waivers or variances to permit *uses* not allowable under a land use category, Cal. Gov't Code § 65906 (West 1983), and prohibits approval of any development plan that is inconsistent with the General Plan, Cal. Gov't Code § 66474(a) (West 1983).[9]

The denial of petitioner's amendment application thus provides no information about what uses the County would permit *within the Rural Lands category*.[10] As to that classification, petitioner never submitted any application.

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[8] In fact, the "informal proposal" was not an application for an RV park at all. It was an informal sketch submitted to the County with the application for LUE/LUO amendment to provide some parameters for the necessary environmental impact assessment (CR 116, Ex. N).

[9] *See Herrington v. County of Sonoma*, 834 F.2d 1488, 1496 (9th Cir. 1987), construing that provision.

[10] Far from applying the ripeness rules rigidly, the Ninth Circuit gave petitioner the benefit of the doubt by assuming that petitioner's submission constituted an informal development proposal. It nevertheless held that in light of the fact that "[t]he County's response specified the numerous deficiencies in the informal proposal and suggested ways to remedy them, . . . the County's denial of this informal request is not a final and authoritative decision exposing the nature and extent of permissible development under the Rural Lands classification." (Slip op., Appendix B-10 to Petition.)

Petitioner argues (pp. 21-22) for the first time that an application would have been futile because, it claims, the uncontradicted evidence showed that no economically viable uses were available under Rural Lands — even by waiver or variance.[11] That argument is a flat misstatement of the record, as is discussed fully in Part B.2 below regarding economic viability. Both courts below correctly held that, taking the evidence in the light most favorable to petitioner, there was no triable issue of fact to support the claim of deprivation of economically viable use.

The 1980 LUE/LUO does not limit petitioner to a single use of its 1,500-acre property; it permits different uses or *combinations of uses* on each of the nine legal parcels of property. As the Ninth Circuit properly noted, in addition to the extensive list of available uses contained in the LUE/LUO, waivers, variances and other statutory procedures are available to expand development potential within the Rural Lands classification and to improve the economic potential of the available uses.

Further, as the Ninth Circuit emphasized, LUO § 22.08.012 (cited as 22.08.120 in the opinion) allows the Planning Commission to waive or modify standards for permissible uses if it finds that specific conditions make the standards unnecessary or ineffective, and LUO § 22.01.044 allows a variance from development and planning area standards (other than parcel size or density) if special circumstances such as topography or property location would deprive the property of privileges enjoyed by other properties.

In addition, Real Property Division Ordinance § 21.48.090 permits modification of road and drainage specifications (road

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11 Petitioner fails to explain how one can assert an as-applied claim when no application has ever taken place. If it were true that the Rural Lands category permitted no economically viable use — even after consideration of all available waivers and variances — then the attack would be a *facial* one.

requirements having been a significant factor in petitioner's economic analysis), and § 21.48.017 permits adjusting parcel lines, which could permit maximizing the economic potential of the various parcels.

Of particular significance to this property, which has historically been used for cattle and horse grazing, an agricultural preserve designation could dramatically lower taxes on the property and permit a profitable operation.[12]

The undisputed evidence below was that waivers and variances are not only available, but are routinely granted by the County. Petitioner does not argue otherwise.

Therefore, petitioner's as-applied challenge must fail because it never made any application for development under Rural Lands, because extensive combinations of uses are available under that category, and because numerous waivers, variances, and other statutory procedures are available that could significantly enhance the development potential of the property. Where an unquestionably correct result has been reached under this Court's settled standards, no important or undecided question is presented for this Court's review.

Moreover, petitioner is incorrect that the Ninth Circuit is applying an overly rigid framework for ripeness analysis.[13]

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[12] Petitioner complained below that property taxes had exceeded the grazing lease income from the property. It has not, however, availed itself of the Williamson Act, Cal. Gov't Code § 51200 *et seq.*, by which land may be restricted by contract to agricultural uses. In such cases, the county assessor may not consider sales data in valuing the property, but may only value the property by capitalizing the annual rental income actually received and typical rents received in the area for similar land in similar use, or where such rental information is not available, based upon the income which such land reasonably would be expected to yield under prudent management. Cal. Rev. & Tax Code § 423. The property might also qualify for an even lower tax rate. *See* Cal. Rev. & Tax Code § 423.3.

[13] Indeed, this Court previously denied certiorari in *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, *modified*, 830 F.2d 968 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775 (1988), the case establishing that framework. If no reason existed to grant certiorari in *Kinzli*, certainly none exists here.

The Ninth Circuit correctly stated the general rule, derived from *Williamson County* and *MacDonald, Sommer & Frates*, that at least one meaningful application for a development plan and a meaningful application for a variance must be presented before a futility argument can be presented. There was no reason to depart from that general rule in this case, where no application had been made and no evidence of futility existed.

In fact, the Ninth Circuit has not rigidly applied the ripeness analysis where the facts demonstrate finality. In *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), for example, the court held the claim to be ripe even though the owner had not fully completed the application process and had not applied for a variance, because the requisite finality of decision had been achieved, and no variance was available within that zone. Further, noting that *MacDonald* had held that a *re*-application may be necessary to analyze economic impact, *Herrington* held that no re-application was necessary because the gravamen of that case was the irrationality of the ordinance, not its economic impact.

Thus, the difference in ripeness analysis depends on the nature of the claim, and is not a difference in *standards*, as suggested recently in *Barancik v. County of Marin*, No. 87-1982 (9th Cir., June 30, 1988) (1988 U.S. App. LEXIS 9074). The other recent Ninth Circuit cases, including *Barancik*, *Herrington*, and *Shelter Creek Development Corp. v. City of Oxnard*, 838 F.2d 375 (9th Cir. 1988), *petition for cert. filed* (U.S. July 15, 1988) (No. 88-86), involved claims that the ordinances violated due process in that they advanced no legitimate state interest or that they violated equal protection. On appeal, none involved a claim of deprivation of all economically viable use.

This case, on the other hand, is based *solely* on the economic impact of the 1980 LUE/LUO on petitioner's property (even if it were viewed as a due process claim that the ordinance had "gone too far," *see Williamson County*, 105 S. Ct.

at 3122-24). Such a claim, as every Justice of this Court has recognized, requires an evaluation of "the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it." *MacDonald*, 477 U.S. at 359; *Williamson County; Pennell v. City of San Jose*, 108 S. Ct. 849 (1988) (majority and dissenting opinions). Such an evaluation cannot be made until petitioner makes an application and the County acts on it.

B. THE FACIAL ATTACK WAS UNSUPPORTED BY EVIDENCE OF DEPRIVATION OF ECONOMICALLY VIABLE USE OR OF REASONABLE INVESTMENT-BACKED EXPECTATIONS.

Petitioner, again erroneously, argues that two important questions arise out of the decision on its facial attack: failure to take account of its reasonable investment-backed profit expectations, and failure to place the burden of proving economically viable use on the County.

1. Reasonable Investment-Backed Expectations.

Petitioner's assertion (pp. 7-15) that there is confusion over the interpretation of "reasonable investment-backed expectations"[14] is simply incorrect. Further, both courts below were unquestionably correct in holding that the County had not unconstitutionally interfered with any such expectations.

Petitioner's discussion of "investment-backed expectations" reveals a fundamental misunderstanding of the concept.

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[14] In *Penn Central*, this Court stated that one factor to consider in analyzing whether a regulation has effected a taking is "the extent to which the regulation has interfered with distinct investment-backed expectations." 438 U.S. at 124.

Petitioner incorporates the issue into the analysis whether a regulation deprives the property owner of all economically viable use of its property. It is apparent from *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and *Penn Central*, however, that the concepts of "economically viable use" and "reasonable investment-backed expectations" are distinct inquiries.[15]

As *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), pointed out, the Taking Clause protects property rights. In defining those rights, the Court applies the "basic axiom that '"[p]roperty interests are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."'" *Ruckelshaus*, 467 U.S. at 1001 (*quoting Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161 (1980), and *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)).

Ruckelshaus holds that there can be no reasonable expectation in the continuing existence of a police power regulation absent an "*express promise*" from the government. 467 U.S. at 1008.[16] Where the government has made no such promise,

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[15] As this Court stated in *Connolly*, in analyzing a regulatory taking claim, "we have identified *three* factors which have 'particular significance:' (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action.'" *Connolly*, 106 S. Ct. at 1026 (quoting *Penn Central*, 438 U.S. at 124 (emphasis added)).

[16] In attempting to assert such rights, the property owners in *Penn Central* and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. ___, 107 S. Ct. 1232, 1247 (1987), attempted unsuccessfully to argue that they had particular property rights that had been interfered with *despite* the fact that their overall properties were admittedly profitable. A similar claim was unsuccessfully attempted in *Williamson County*; the property owner asserted that, in addition to his claim that he had been deprived of all economically viable use, he had acquired a vested right to his particular development plan that protected him from *any* impairment of his "vested right" or "expectation interest." 105 S. Ct. at 3119-20 n.12.

the plaintiff merely has a "unilateral expectation" of fulfilling its goals that is not constitutionally protected. *Ruckelshaus*, 467 U.S. at 1006-07; *Webb's*, 449 U.S. at 161.

Penn Central ruled, in the zoning context, that property owners have no constitutionally protectable interest in the most beneficial use of their land. 438 U.S. at 125. The Court rejected as "quite simply untenable" the contention that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development." 438 U.S. at 130. That is precisely what petitioner sought to do here.[17]

Neither state nor federal law creates a property right in existing zoning. It is black-letter law in California (and most if not all other states, for that matter) that a property owner has no vested right in the zoning on its property. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 796, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *appeal dismissed*, 429 U.S. 1083 (1977); *HFH, Ltd. v. Superior Court*, 15 Cal. 3d 508, 521, 542 P.2d 237, 125 Cal. Rptr. 365 (1975), *cert. denied*, 425 U.S. 904 (1976).[18] A property owner can, however, obtain a vested property right that protects it from subsequent changes in zoning by obtaining a building permit and beginning substantial work or financial commitments under that permit. *Avco Community Developers, Inc.*, 17 Cal. 3d at 791.

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[17] This Court's rulings make it clear that to have a constitutionally protectable interest in a particular development project — over and above the constitutional protection against deprivation of all economically viable use — requires a state or federal statute or regulation creating an express promise against impairment of that project.

[18] Indeed, in California a general plan could be amended up to three (now four) times a year, Cal. Gov't Code § 65361 (now § 65358). *See Furey v. City of Sacramento*, 592 F. Supp. 463, 470 (E.D. Cal. 1984), *aff'd*, 780 F.2d 1448 (9th Cir. 1986).

Lower courts have not, as petitioner suggests, had difficulty in interpreting this Court's standards. In zoning and similar permit cases, they have without exception ruled that because government makes no "binding legislative commitment" to maintain the present zoning, a property owner has no reasonable expectation, investment-backed or otherwise, that the zoning will not be changed.[19] Where, on the other hand, the property owner has obtained a vested right under state or federal law, that property interest is protected by the Taking Clause.[20]

The correctness of the *Ruckelshaus* rule is evident when applied to this case. Petitioner's investors bought the property

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19 *Dean Tarry Corp. v. Friedlander*, 826 F.2d 210 (2d Cir. 1987) (Planning Board's wide discretion under zoning ordinance prevented developer's expectation of success for development plan from rising to the level of a property right meriting Taking Clause protection); *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54 (2d Cir. 1985) (no entitlement to certificate of location); *Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023 (3d Cir. 1987), *cert. denied*, 107 S. Ct. 2482 (1987) (no reasonable investment-backed expectation in zoning); *MacLeod v. County of Santa Clara*, 749 F.2d 541, 548 (9th Cir. 1984), *cert. denied*, 472 U.S. 1009 (1985) (applicant must have been aware standards and conditions governing issuance might cause application to be denied, and had no assurance that permit would issue; taking cannot be premised on denial of opportunity to exploit particular project he had come to believe would be available for development); *Deltona Corp. v. United States*, 657 F.2d 1184, 1193 (Ct. Cl. 1981), *cert. denied*, 455 U.S. 1017 (1982); (developer must have been aware that standards and conditions governing issuance of permits could change; it therefore had no assurance that permits would issue); *Furey*, 592 F.Supp. at 470; *Graham v. Estuary Properties, Inc.*, 399 So. 2d 1374 (Fla. 1981) (developer had no statutory right to fill swamp land for construction; it had only its own subjective expectation that the land could be developed in the manner it proposed).

20 *Nemmers v. City of Dubuque*, 716 F.2d 1194 (8th Cir. 1983) (under taking clause of Iowa Constitution, plaintiff had acquired vested right by work performed and commitments made pursuant to building permit); *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), *cert. denied*, 456 U.S. 973 (1982) (building permit gave property owner an interest protected by Taking Clause); *Avco Community Developers, Inc.*, 17 Cal. 3d 785.

over 15 years before the zone change to which they objected. They have held the property vacant ever since, putting it to use only as grazing land. They could have protected themselves as to their purported expectations at any time by processing a development plan, but they did not do so. The ruling for which petitioner contends would allow a speculator to purchase property and hold it undeveloped in perpetuity, while tying the hands of government to rezone the property without paying compensation. Constitutional "justice and fairness" do not require the public to bear the cost of petitioner's business gamble of delaying development for so long.

2. Economically Viable Use.

Petitioner faced an "uphill battle in making a facial attack on the [zoning restriction] as a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. ___, 107 S. Ct. 1232, 1247 (1987); slip op. at B-11. The hill was particularly steep in this instance because, as the Ninth Circuit recognized, the 1980 LUE/LUO did not restrict petitioner's property to only one or two uses. The Rural Lands category provided for numerous *groups* of special uses (see Appendix A), which could be used alone or in combination.

Petitioner chafes under the burden of proof that has been placed on it, but the burden of proving deprivation of economically viable use clearly rests there under *Penn Central*, *Agins*, and *Keystone*. That burden of proof does not change just because the matter is decided on summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Petitioner also requests this Court to issue guidance as to precisely what factors must be considered in every case to determine economic viability. That request flies in the face of *Penn Central's* rule of ad hoc analysis, 438 U.S. at 124, and is particularly inappropriate in this case, because regardless of the precise standard to be applied, petitioner did not and could

not conceivably meet its burden.[21]

Agins and *Penn Central* laid down the principle that if a zoning regulation is a valid exercise of the police power, there is no taking if any "economically viable use" of the property remains. *Agins*, 447 U.S. at 260; *Penn Central*, 438 U.S. at 124.

As *Penn Central* stated, the decisions "*uniformly* reject the proposition that diminution in property value, *standing alone*, can establish a 'taking,' *see Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (75% diminution in value caused by zoning law); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87-1/2% diminution in value)." 104 U.S. at 131 (emphasis added). *Agins* and *Keystone Bituminous Coal* reaffirmed that principle.[22]

Rather than focusing on diminution in value, *Penn Central* mandates that land use legislation must be analyzed by "focusing on the uses the regulations permit." 104 U.S. at 131. *See American Savings & Loan Ass'n v. County of Marin*, 653 F.2d 364, 368 (9th Cir. 1981) (no taking occurs if "a reasonable use of the property remains").

The courts of appeal that have addressed the issue have applied a consistent analytical framework in determining

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21 Contrary to petitioner's allegations, the County *did* present evidence of economic viability. It presented the 1980 LUE/LUO, which show on their face the availability of numerous groups of uses which are ordinarily economically viable uses (see Appendix A) and the waiver, variance and statutory procedures discussed herein (Appendices B and C); it presented declarations as to the availability of waivers and variances (see CR 124, Ex. J); and it presented petitioner's admissions as to the market value of its property before and after rezoning, as to return on investment, and as to the economic viability of use of the property as a dude ranch (CR 1; CR 124, Exs. G, U, V, W).

22 The Court gave further guidance in *Keystone* that the economic viability analysis requires a comparison between "the value that has been taken with the value that remains." It stated that this comparison "is by no means conclusive." The "important role" is that of the nature of the state action. *Keystone*, 107 S. Ct. at 1245, 1248.

whether economically viable use of property remains. They have uniformly held that immediate profitability (*i.e.*, whether current income covers current expenses of a permitted use) is not the only measure of economic viability. Indeed, it may be the wrong measure when the owner has historically held the property for long-term investment purposes. The courts have further held that remaining market value (excluding speculative uses) should also be considered, because even if the property is not profitable in its present use, others may be willing to purchase the property for other permissible uses.[23] (The use of different factors in different cases is entirely appropriate, inasmuch as the economic analysis in each case differs.) Using *any* of these factors, petitioner's claim fails:

(1) Historic use. The 1980 LUE/LUO permit the continuation of the historic uses to which petitioners have put the property since 1964 — holding the property for long-term investment with interim use for grazing purposes.[24]

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23 *See Florida Rock Industries, Inc. v. United States*, 791 F.2d 893 (Fed. Cir. 1986), *cert. denied*, 107 S. Ct. 926 (1987) (court should consider not only immediately viable uses, but also market value — what knowledgeable long-term investors would pay for the property); *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984), *cert. denied*, 470 U.S. 1087 (1985) (crucial inquiry is not whether zoning ordinance lets plaintiffs use the property in immediately profitable manner, but whether uses allowed are sufficiently desirable that others might be interested in purchasing for those uses); *Pompa Construction Corp. v. City of Saratoga Springs*, 706 F.2d 418 (2d Cir. 1983) (same; while a particular permitted use would not provide a profitable return, the issue is whether someone would be interested in purchasing the property for such a purpose); *MacLeod v. County of Santa Clara*, 749 F.2d at 541 (where the present and primary uses of the property are holding for long-term investment with interim use for grazing, inquiry should not be into immediate profitability but into whether the challenged regulation permits continuance of those present and primary uses).

24 Petitioner admitted (CR 127, p. 21) that the standard for economic viability is met if the property can be held for investment for profit on sale. By its own definition, that standard was met. Similarly, *MacLeod v. County of Santa Clara*, 749 F.2d at 541, held that holding property for investment is a recognized use of property.

(2) Market value remaining. Petitioner admitted that the market value of the South Shore Property immediately following the impact of the regulation was $992,500, which had increased by March 1984 to $1,740,800.[25] In addition, if the North Shore Property, which has more intensive development rights, is taken into account, the per-acre value is even higher.

(3) Return on investment. Petitioner's own figures (the 1975 investment value of $521,000, plus income received, less taxes and operating expenses), show that it had a return on its investment on the South Shore Property alone of $461,035 after the effects of the 1980 LUE/LUO. The Ranch Company *nearly doubled its money.*[26] In addition, it obtained $500,000 in capital through refinancing the property in 1983. The market value of the South Shore Property steadily increased under the Rural Lands classification to $1,740,800 in March 1984 — *over three times* the 1975 investment value. (Again, the return on investment is further increased if the income and income potential of the North Shore Property are taken into account.)

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[25] As petitioner noted in its brief on appeal, "the value of land is determined by its use" (Br. at 22). Therefore, the market value reflects prudent investors' views of the value of the uses of the property. Petitioner's appraiser excluded speculative sales from his appraisal (CR 124, Ex. V).

While this market value is less than that petitioner claimed it would have enjoyed under the "Recreation" category ($1,600,000), petitioner suffered no loss in investment value. As to any reduction in anticipated profits, *Andrus v. Allard*, 444 U.S. 51, 66 (1979), has stated that "the interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests."

[26] For the first time on appeal, petitioner suggested that return may have been reduced by inflation. Judicial notice of general inflation rates is improper, especially where not raised below, in the absence of evidence that general inflation rates are applicable to this property. *See San Luis Obispo Properties, Inc. v. Pacific Gas & Elec. Co.*, 28 Cal. App. 3d 556, 564, 104 Cal. Rptr. 733 (1972). Even if inflation is taken into account as petitioner wanted to do, it still had a 41% increase on the value of its investment. *See* Statistical Abstract of the United States, p. 468.

(4) Immediate profitability. Petitioner failed to submit evidence that no use or *combination of uses* permitted under Rural Lands could be developed in an immediately profitable manner. Some of the numerous groups of uses allowable on the South Shore Property (all of which are usually beneficial uses of land) include, but are not limited to:

1. Single Family Dwellings (2 for each of the 9 parcels);
2. Rural Sports and Group Facilities (including hunting and fishing clubs, dude ranches, health resorts, recreational camps, group camps, and equestrian facilities including riding academies);
3. Crop Production and Grazing;
4. Livestock and Nursery Specialties;
5. Mobile Home Dwellings.[27]

In opposition to the summary judgment motion, petitioner submitted sketchy expert declarations purporting to contest the economic viability of *certain* uses. Contrary to petitioner's assertion, however, that evidence completely failed to cover *all* the uses and combinations of uses available under Rural Lands.

Both courts below correctly recognized that petitioner had failed to submit *any* evidence showing that a dude ranch in

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[27] Contrary to the petitioner's assertion (Petition, p. 8), the County Planning Department memorandum did not state that only these five groups were economically viable. If the memorandum is considered at all (it is and has been objected to as a privileged memorandum produced with plaintiff's express agreement that privilege was not waived, see CR 136, p. 2), it addresses only certain uses of the property "that could provide the highest possible economic return for the least improvement costs" as *principal* uses of the property. It expressly does not address the economic viability of *other* uses as principal uses, or of *these* uses *in combination with* other uses.

combination with other uses (other than a working ranch)[28] would not be economically viable.

Further, petitioner's evidence failed to consider whether a dude ranch of a different size than the two chosen would have been profitable, whether profitability could be achieved by increasing winter utilization with organizational use of the facility (such as corporate retreats), whether a dude ranch on a portion of the property could be combined with single-family residences or other uses on other parcels to increase economies of scale, or whether waivers of dude ranch standards were available under LUO § 22.08.012. It also failed to present evidence on health resorts (other than hot-spring spas) (CR 134 at 29).

Also, petitioner's evidence completely failed to address the potential for combining uses on the property, for utilizing each of its nine legal parcels for different uses, or for utilizing the waivers and variances, discussed above, contained in LUO §§ 22.08.012 or 22.01.044 or Real Property Division Ordinance §§ 21.48.017 or 21.48.090. Moreover, petitioner failed to consider an agricultural preserve designation under Gov't Code § 51200, *et seq.*, which could dramatically lower the taxes on the property. Any or all of these actions could profoundly change the economic analysis in this case. Finally, it presented no evidence on the economic viability of the intensive uses permitted on the North Shore Property.

In summary, the courts below both correctly determined the 1980 LUE/LUO are constitutional on their face as a matter of

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28 In addition, petitioner submitted no *admissible* evidence as to the lack of economic viability of a dude ranch standing alone or in combination with a working ranch. The district court properly excluded petitioner's unsworn and late-filed reports on that subject, which had contradicted petitioner's earlier admissions that a dude ranch could (and would) be an economically viable use of the property (CR 1, para. 25; CR 124, Ex. V., p. 112, Ex. W, I-20, 21). The district court recognized, however, that even if these reports *were* considered, petitioner had still not submitted any evidence on the economic viability of a dude ranch in combination with other uses (See Appendix D to Petition, pp. 7-8).

law. The LUE/LUO did not alter the existing use of the property; they permit numerous other uses; and they have permitted a substantial return on investment. The LUE/LUO did not remove any of the "essential sticks in the bundle of property rights" such as the right to exclude others from the property or to sell it at will. Petitioner, along with all others in the County, will benefit from preservation of the natural beauty of Lake Nacimiento and from the provision of adequate public facilities. Petitioner, like the plaintiff in *Agins*, 447 U.S. at 262, is "free to pursue [its] reasonable investment expectations by submitting a development plan" to the County.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Dated: July 22, 1988

Respectfully submitted,

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APPENDIX A

EXCERPTS FROM COUNTY OF SAN LUIS OBISPO 1980 GENERAL PLAN LAND USE ELEMENT ("LUE")

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KEY TO TABLE O

Use Status	Definition
A	Allowed use, unless otherwise limited by a specific planning area standard. Land Use Ordinance Chapter 22.03 ("Required Level of Processing") determines the permit necessary to establish an "A" use, and Chapters 22.04 through 22.06 determine the site design, site development, and operational standards that affect the use. See also the "Planning Area Standards" sections of the Land Use Element area plans to find any standards that may apply to a project in a particular community or area.
S	Special use, allowable subject to special standards and/or processing requirements, unless otherwise limited by a specific planning area standard. The following list shows where in the Land Use Ordinance to find the special standards that apply to particular uses.

"S" Number	Applicable Land Use Ordinance Section and/or Land Use Element Requirement	
1	22.08.120 b	Miscellaneous Uses
3	22.08.040	Agricultural Uses
4	22.08.060	Cultural, Educational & Recreation Uses
7	22.08.140	Outdoor Commercial Uses
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13	22.08.280	Transportation, Utilities & Communication
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D. LAND USE DEFINITIONS

This section contains definitions of the land uses that can be established under the Land Use Element. The uses defined here are allowed in the various land use categories as determined by the preceding charts. The definitions are intended only to list the various land uses included under each general heading, and do not explain what permit requirements or performance standards may be applicable to a given use. Standards and review procedures for establishing land uses are contained in the Land Use Ordinance.

The following definitions are correlated wherever possible with the use definitions of the Standard Industrial Classification Manual (SIC), published by the Executive Office of the President, Office of Management and Budget (1972). The SIC is referenced wherever appropriate.

Agricultural Accessory Structure

An uninhabited structure or building designed and built to store farm animals, implements, supplies or products (not including commercial greenhouses which are included under "Nursery Specialties," or buildings for agricultural processing activities) that contains no residential use and is not open to the public. Includes barns, grain elevators, silos, windmills, wind generators and other similar buildings and structures. (Amended 1981, Ord. 2089)

* Ag Processing

Establishments performing a variety of operations on crops after harvest, to prepare them for market on-site or further processing and packaging at a distance from the agricultural area including; alfalfa cubing; hay baling and cubing; corn shelling; drying of corn, rice, hay, fruits and vegetables; pre-cooling and packaging of fresh or farm-dried fruits and vegetables; grain cleaning and custom grinding; custom grist mills; custom milling of flour, feed and grain; sorting, grading and packing of fruits and vegetables; tree nut hulling and shelling; cotton gining; wineries and alcohol fuel production. Note: any of the above activities performed in the field with mobile equipment not involving permanent buildings are included under "Crop Production and Grazing." (SIC: 0723, 0724) (Amended 1981, Ord. 2063)

Airfields and Landing Strips

Transportation uses including any area of land or water used for the landing and take-off of aircraft; also, any appurtenant areas used for airport buildings and related facilities, including aircraft sales. Also includes agricultural, personal, restricted and public use landing strips, and heliports.

Animal Husbandry Services

Establishments primarily engaged in performing services for animals, including veterinary services, animal hospitals, and animal kennels (does not include feedlots, which are listed under "Livestock Specialties"). (SIC: Groups 074, 075)

Bed and Breakfast Facilities

Residential structures with one family in permanent residence where bedrooms without individual cooking facilities are rented

for overnight lodging, where at least one meal daily is provided. Does not include "Hotels and Motels," which are defined separately; nor rooming and boarding houses which are included under "Multi-Family Dwellings." (Amended 1981, Ord. 2063)

Caretaker Residence

A permanent residence that is secondary or accessory to the primary use of the property. A caretaker dwelling is used for housing a caretaker employed on the site of any non-residential use where a caretaker is needed for security purposes or to provide 24 hour care or monitoring of people, plants, animals, equipment, or other conditions on the site.

Churches

Religious organization facilities operated for worship or promotion of religious activities, including churches and religious Sunday-type schools. Other establishments maintained by religious organizations, such as full-time educational institutions, hospitals and other potentially-related operations (such as a recreational camp) are classified according to their respective activities.

* Collection Stations

Facilities for temporary accumulation and storage of recyclable discarded materials, which are subsequently transported to recycling centers or solid waste disposal sites for further processing. (Does not include automobile wrecking yards or any recycling processing facilities, which are listed under Recycling and Scrap; does not include temporary storage of toxic or radioactive waste materials).

* Concrete, Gypsum, and Plaster Products

Manufacturing establishments producing concrete building block, brick and all types of precast and prefab concrete products. Also includes ready-mix concrete batch plants, lime manufacturing, and the manufacture of gypsum products, such as plasterboard. (SIC: Groups 326, 327)

* Correctional Institutions

Institutions for confinement and correction of offenders sentenced by a court. Halfway houses and homes for delinquents, or other facilities not under court order, are classified in "Social and Service Organizations." (SIC: Group 9223)

Crop Production and Grazing

Agricultural uses including production of grains, field crops, vegetables, melons, fruits, tree nuts, flower fields and seed production, ornamental crops, tree and sod farms, associated crop preparation services and harvesting activities including but not limited to mechanical soil preparation, irrigation system construction, spraying and crop processing in the field not involving a permanent structure. Also includes the raising or feeding of beef cattle, horses, sheep and goats by grazing or pasturing. Does not include feedlots, which are included under "Livestock Specialties." The distinction between feedlots and grazing operations is established by the Land Use Ordinance, Chapter 22.08.

Domestic Animal Raising

The keeping, feeding or grazing of animals as an avocation, hobby or school project, subordinate to the principal residential use of a property. Includes species commonly considered as farm animals as well as exotic species, but does not include household pets. (See "Livestock Specialties.")

* Farm Equipment and Supplies

Establishments primarily engaged in sale or rental of agricultural machinery and equipment for use in the preparation and maintenance of the soil, the planting and harvesting of crops, and other operations and processes pertaining to work on the farm; also dairy and other livestock equipment. Includes agricultural machinery (except tractors and other motorized, self-propelled farm vehicles, which are included under "Auto, Mobilehome and Vehicle Dealers and Supplies"), dairy farm machinery and equipment, irrigation equipment, poultry equipment and frost protection equipment; hay, grain and feed sales; retail sales of prepackaged fertilizer and agricultural sprays. Sales may include the final assembly of farm machinery, implements or equipment from component parts received from the manufacturer in a partially assembled state, but not the creation of such components from raw materials. (Amended 1981, Ord. 2075)

Farm Labor Quarters

Includes residences, rooming and boarding houses and mess halls for farm workers employed on land owned by the owner of the building site on which the quarters are located.

Fisheries and Game Preserves

Resource extraction operations engaged in commercial fishing (including marine-related animals, mammals, etc.), and the operation of fish hatcheries, fish and game preserves, and game propagation. (SIC: Group 09)

* Food and Kindred Products

Manufacturing establishments producing or processing foods and beverages for human consumption and certain related products. Includes: (1) meat and poultry products (slaughter-

ing, canning, and curing and by-product processing); (2) dairy products processing; (3) canned and preserved fruit and vegetables and related processing; (4) grain mill products and by-products; (5) bakery products, sugar and confectory products; (6) fats and oil products, including rendering plants; (7) beverages and liquors (except wineries, which are included under "Ag Processing"); (8) and miscellaneous food preparation from raw products. (Operations on crops subsequent to their harvest are included under "Ag Processing"). (SIC: Group 20)

Forestry

Establishments primarily engaged in operation of timber tracts, tree farms, forest nurseries, and related activities such as reforestation services; also the gathering of gums barks, sap, moss and other forest products; also includes logging camps and sawmills (except for mills producing finished lumber, which are included under Lumber and Wood Products). (SIC: Groups 08, 241)

Home Occupations

The gainful employment of the occupant of a dwelling, with such employment activity being subordinate to the residential use of the property, and there is no display, no stock in trade, or commodity sold on the premises except as provided by the Land Use Ordinance, and no persons employed other than residents of the dwelling.

Livestock Specialties - Intensive

Agricultural establishments primarily engaged in commercial livestock keeping or feeding as a principal land use that, because of operational characteristics, may generate dust, odors or visual impacts that could adversely affect adjacent properties. Such uses include hog ranches; dairies, dairy and beef cattle feedlots; chicken, turkey and other poultry farms.

The distinction between a grazing operation and a feedlot is established by the Land Use Ordinance, Chapter 22.08 (see also "Domestic Animal Raising"). (SIC Groups 021 - 027)

Livestock Specialties - Minor

Includes commercial small-animal specialties operated as a principal land use, such as: rabbit farms and other fur-bearing animals; bee farms; avaries; worm farms, etc.

Mining

Resource extraction establishments primarily engaged in mining, developing mines or exploring for metallic minerals (ores), coal and non-metallic minerals (except fuels), or surface mines extracting crushed and broken stone, dimension stone or sand and gravel. (See also "Stone and Cut Stone Products"). (SIC: Groups 10, 11, 12, 14)

Mobile Home Dwelling

A vehicle without self-propulsion, designed and equipped as a dwelling unit with or without a permanent foundation, which is wider than 8 feet or longer than 32 feet.

Nursery Specialties

Agricultural establishments primarily engaged in the production of ornamental plants and other nursery products, grown under cover or outdoors. Also includes establishments engaged in the sale of such products (*e.g.* wholesale and retail nurseries) and commercial scale greenhouses (home greenhouses are included under "Residential Accessory Uses.") (Amended 1981, Ord. 2089)

Offices, Temporary

A mobilehome, recreational vehicle or modular unit used as: a temporary business or construction office during construction of permanent facilities on the same site; a temporary on-site real estate office for a development project; or a temporary business office in advance of permanent facility construction. (Amended 1981, Ord. 2063)

Off-Road Vehicle Courses

Rural areas set aside for the use of off-road vehicle enthusiasts including dirt bike, enduro, hill climbing or other off-road motorcycle courses; also, rural areas for competitive events utilizing four-wheel drive vehicles. Does not include sports assembly facilities, or simple access roads which are useable by only four-wheel drive vehicles.

Outdoor Retail Sales

Temporary retail trade establishments including: Farmer's Markets; sidewalk sales; seasonal sales involving christmas trees, fireworks, pumpkins or other seasonal items; semi-annual sales of art or handcrafted items in conjunction with community festivals or art shows; and retail sales or various products from individual motor vehicles in temporary locations outside the public right-of-way, not including bakery, ice cream and similar vending vehicles that conduct all sales within the right-of-way and do not stop in any location except on customer demand. Does not include flea markets or swap meets, which are included under "Storage Yards and Sales Lots." (Amended 1981, Ord. 2089)

Organizational Houses

Residential lodging houses operated by membership organizations for their constituents and not open to the general public.

Includes fraternity and sorority residential houses; monasteries and religious residential retreats.

* Paving Materials

Manufacturing establishments producing various common paving and roofing materials, including paving blocks made of asphalt, creosoted wood and various compositions of asphalt and tar. (SIC: Group 295)

Petroleum Extraction

Resource extraction establishments primarily engaged in: producing crude petroleum and natural gas; recovering oil from oil sands and shales; and producing natural gasoline and cycle condensate. Activities include exploration, drilling, oil and gas well operation and maintenance, operation of natural gas and cycle plants, the mining and extraction of oil from oil sands and shales, and on-site processing only to the extent necessary to permit extraction (*e.g.* enhanced recovery techniques including the use of steam generators), or to conform extracted crude to pipeline requirements. (SIC: Group 13)

Pipelines and Power Transmission

Transportation establishments primarily engaged in the pipeline transportation of crude petroleum; refined products of petroleum such as gasoline and fuel oils; natural gas; mixed, manufactured or liquified petroleum gas; or the pipeline transmission of other commodities. Power transmission includes facilities for the transmission of electrical energy for sale, including transmission lines for a public utility company. Does not include offices or service centers (classified in "Offices"), equipment and material storage yards (classified under "Storage yards and Sales Lots"), distribution substations (classified under "Public Utility Centers"), or powerplants (classified

under "Power Generating Plants"). (SIC: Groups 461, 491). (Amended 1981, Ord. 2063)

* Power Generating Plants

Establishments engaged in the generation and distribution of electrical energy for sale to consumers. Does not include cogeneration facilities which are allowed incidental to any approved commercial, industrial or agricultural use; or point-of-use wind generators which are included under "Agricultural Accessory Structures." Transmission lines located off the site of the power plant are included under "Pipelines and Power Transmission." Electrical substations are included under "Public Utility Centers." (SIC: Group 49)

Public Safety Facilities

Facilities operated by public agencies including fire stations, other fire prevention and firefighting facilities, police and sheriff substations and headquarters, including interim incarceration facilities (not including jails which are defined under "Correctional Institutions").

Public Utility Centers

Fixed-base structures and facilities serving as junction points for transferring utility services from one transmission voltage to another or to local distribution and service voltages. These uses include: electrical substations and switching stations; telephone switching facilities; natural gas regulating and distribution facilities; public water system wells, treatment plants and storage; and community wastewater treatment plants, settling ponds and disposal fields. These uses do not include office or service centers (classified in "Offices"), or equipment and material storage yards (classified in "Storage Yards and Sales Lots").

* Recycling and Scrap

Establishments primarily engaged in assembling, breaking up, sorting, temporary storage and distribution of recyclable or reusable scrap and waste materials, including auto wreckers engaged in dismantling automobiles for scrap. Also includes any storage of such materials in an area larger than 200 square feet or higher than six (6) feet. Does not include terminal waste disposal sites, which are separately defined. Does not include temporary storage of toxic or radioactive waste materials.

Residential Accessory Uses

Includes any use that is customarily part of a residence and is clearly incidental and secondary to a residence and does not change the character of the residential use. Residential accessory uses include the storage of vehicles and other personal property, and accessory structures including swimming pools, workshops, studios, greenhouses, garages, and guesthouses (without cooking or kitchen facilities).

* Residential Care

Establishments primarily engaged in the provision of residential social and personal care for children, the aged, and special categories of persons with some limits on ability for self-care, but where medical care is not a major element. Includes: children's homes; halfway houses; orphanages; rehabilitation centers; self-help group homes. (SIC: Group 836)

Roadside Stands

Open structures for the retail sale of agricultural products (except hay, grain and feed sales--included under Farm Equipment and Supplies), located on the site or in the area of the property where the products being sold were grown.

Rural Sports and Group Facilities

Facilities for special group activities such as: outdoor archery, pistol, rifle, and skeet clubs and facilities (indoor shooting facilities are included under the definition of "Amusements and Recreational Services"); dude ranches; health resorts including outdoor hot spring, spa or hot tub facilities; hunting and fishing clubs; recreational camps (including incidental RV camping but not RV parks); group or organized camps; incidental seasonal camping areas without facilities; and equestrian facilities including riding academies, schools, stables and exhibition facilities. (Amended 1981, Ord. 2063)

Schools - Preschool to Secondary

Pre-school, day-care centers, elementary and secondary schools serving grades 1 through 12, including denominational and sectarian. Kindergartens and military academies are also included. (SIC: Group 821)

Single-Family Dwelling

A detached building designed for and/or occupied exclusively by one family. Also includes attached ownership units using common wall development or airspace condominium ownership, where a proposed site qualifies for planned development through designation by planning area standard or through compliance with any planned development or cluster division standards of the Land Use Ordinance. (Amended 1981, Ord. 2063)

* Small Scale Manufacturing

Manufacturing establishments not classified in another major manufacturing group, including: Jewelry, silverware and plated ware; musical instruments; toys; sporting and athletic goods;

pens, pencils, and other office and artists' materials; buttons, costume novelties, miscellaneous motions, brooms and brushes; caskets and other miscellaneous manufacturing industries. Also included are artisan and craftsman-type operations which are not home occupations, and which are not secondary to on-site retail sales. Also includes small-scale blacksmith and welding services when accessory to another use. (SIC: Group 39) (Amended 1981, Ord. 2063)

* Stone and Cut Stone Products

Manufacturing establishments primarily engaged in cutting, shaping, and finishing marble, granite, slate, and other stone for building and miscellaneous uses. Also includes establishments primarily engaged in buying or selling partly finished monuments and tombstones. (SIC: Group 328)

Storage, Accessory

The indoor or outdoor storage of various materials on the same site as a principal building or land use which is other than storage, which supports the activities or conduct of the principle use.

* Structural Clay and Pottery-Related Products

Manufacturing establishments primarily producing brick and structural clay products, including pipe, china plumbing fixtures, and vitreous china articles, fine earthenware and porcelain electrical supplies and parts. Artist/craftsman uses are included in "Small Scale Manufacturing" or "Home Occupations." (SIC: Groups 325, 326)

Temporary Construction Yards

A storage yard for construction supplies, materials or equipment, located on a site other than the construction site itself or immediately adjacent to it, for use only during the actual construction of a project.

Temporary Dwelling

Includes the temporary use of a mobilehome or recreational vehicle as a dwelling unit, following the issuance of a building permit for a permanent residence while the permanent residence is under construction.

Temporary Events

Any use of a structure or land for an event for a limited period of time where the site is not to be permanently altered by grading or construction of accessory facilities. Events include but are not limited to art shows, rodeos, religious revivals, tent camps, outdoor festivals and concerts.

Textile Mills

Manufacturing establishments engaged in performing any of the following operations: Preparation of fiber and subsequent manufacturing of yarn, threads, braids, twine cordage; manufacturing woven fabric and carpets and rugs from yarn; dying and finishing fiber, yarn, fabric, and knit apparel; coating, waterproofing, or otherwise treating fabric; the integrated manufacture of knit apparel and other finished products from yarn; and the manufacture of felt goods, lace goods, non-woven fabrics and miscellaneous textiles. (SIC: Group 22)

Transmission and Receiving Facilities

Public, commercial and private electromagnetic and photo-electrical transmission, repeater and receiving stations for radio, television, telegraph, telephone, data network and other microwave applications; includes earth stations for satellite communications. (See "Broadcasting Studios.")

Warehousing

Establishments primarily engaged in the storage of farm products, furniture, household goods, or other commercial goods of any nature for later distribution to wholesalers and retailers. Does not include warehouse facilities where the primary purpose of storage is for goods for wholesaling Distribution. Does not include terminal facilities for handling freight (classified in "Vehicle and Freight Terminals"). Also includes warehouse, storage or mini-storage facilities offered for rent or lease to the general public.

Waste Disposal Sites

County-approved or operated refuse dumps, sanitary landfills and other solid waste disposal facilities of a terminal nature, where garbage, trash or other unwanted materials are abandoned, buried or otherwise discarded with no intention of re-use. This definition does not include disposal sites for toxic or radioactive waste materials.

Wholesaling and Distribution

Establishments engaged in selling merchandise to retailers; to industrial, commercial, institutional, farm, or professional business users; or to other wholesalers; or acting as agents or brokers in buying merchandise for or selling merchandise to such persons or companies. Includes such establishments as:

merchant wholesalers; agents, merchandise or commodity brokers, and commission merchants; assemblers, buyers and associations engaged in the cooperative marketing of farm products. (SIC: Group 50, 511-516, 518, 519)

APPENDIX B

EXCERPTS FROM COUNTY OF SAN LUIS OBISPO REAL PROPERTY DIVISION ORDINANCE AND 1980 LAND USE ORDINANCE ("LUO")

21.48.017 Lot line adjustments. (a) General. Lot line adjustments between two or more adjacent parcels, where the land taken from one parcel is added to an adjacent parcel and where a greater number of parcels than originally existed is not thereby created, shall be processed pursuant to this section.

(b) Application Contents. Lot line adjustment applications consisting of the following shall be submitted to the planning department:

(1) Four copies of a completed application form as required by the planning department;

(2) Two copies of a preliminary title report concerning the property, not more than six months old, with an updated title report required at the time of recordation of the certificate of compliance;

(3) Seven copies of a lot line adjustment map accurately drawn to scale. Measurements shall be identified by feet, square feet or acres to the nearest tenth. The map shall meet the following criteria:

(i) The size and scale of the prints shall be the same as those for tentative maps set forth in Section 21.48.035.

(ii) All exterior and interior lines shall be shown on the map and shall be identified by course and bearing description, based on survey data, calculated data, or information of record. If a survey is done, any monuments established must be shown on a record of survey filed in accordance with the Land Surveyors Act, Business and Professions Code Sections 8700, *et seq.*,

(iii) Proposed new lines and lines to be eliminated shall be so identified in written notation or by legend. Lines to be eliminated shall be dashed or otherwise

drawn so as to be clearly distinguishable from and subordinate to remaining and new lines,

(iv) Areas of resulting parcels shall be identified,

(v) All existing structures accurately located on the original parcels together with their dimensions, the distance between structures and the number of stories or height of each structure,

(vi) The distance from the existing structures to the boundary lines of the new parcel on which the structures are located. Such distances shall be established by a registered civil engineer or licensed land surveyor's survey when deemed necessary by the planning department,

(vii) The names, county road numbers and widths of abutting streets,

(viii) The locations, purpose and width of all existing and proposed easements, streets and appurtenant utilities,

(ix) The approximate location of all water-courses, drainage channels and existing drainage structures,

(x) Approximate high-water lines in lake, ocean or reservoir areas and areas subject to inundation,

(xi) A description of the property sufficient to identify it to the assessor's map,

(xii) North point and scale,

(xiii) Vicinity map,

(xiv) Location of wells and septic tanks.

(c) Criteria To Be Considered. A lot line adjustment shall not be approved or conditionally approved unless there is compliance with criteria relative to general plan consistency, parcel design, minimum lot area, environmental quality, and public health and safety criteria as specified in this title and other applicable county and state code provisions relating to real property divisions. These criteria will be considered satisfied if the resulting parcels maintain a position with respect to said criteria which is equal to or better than such position

prior to approval or conditional approval of the lot line adjustment.

(d) Action by Subdivision Review Board. The subdivision review board shall deny a lot line adjustment application if the criteria in subsections (a), (b) and (c) of this section are not met. If the criteria are met, the subdivision review board may recommend approval to the board of supervisors. A denial by the subdivision review board shall be final unless appealed to the board of supervisors within ten days of the denial.

(e) Action by Board of Supervisors. A lot line adjustment may be approved or conditionally approved only by the board of supervisors.

(f) Final Processing. The final processing for a lot line adjustment shall be the same as that for parcel maps specified in Sections 21.48.165, 21.48.170, 21.48.175, 21.48.200, 21.48.210, 21.48.215, and 21.48.230. In addition, lot line adjustment parcel maps shall be based on compiled record data when sufficient information exists on filed maps to locate and retrace the exterior boundary lines on the parcel map. The determination as to whether sufficient information exists shall be made by the county surveyor.

21.48.090 Adjustments. (a) In performing its responsibilities pursuant to this title, the subdivision review board may consider, and in cases where undue hardship would result from the application of the regulations established in this chapter, recommend conditional adjustments or exceptions from these regulations.

(b) Requests for adjustments shall be submitted in writing to the planning department prior to the regular meeting of the subdivision review board at which the application of the divider is to be considered. When the regulation from which the applicant is seeking relief is prescribed in Title 22 of this code, the applicant shall seek relief pursuant to that title.

(c) Requests for variation from standard improvement specifications and drawings and/or required offers of dedication

should be requested by the applicant in writing at the time the application is filed, in accordance with Section 21.48.045 (a)(3), and shall set forth facts to support the following criteria:

(1) That there are special circumstances or conditions affecting the property;

(2) That the exception is necessary for the preservation and enjoyment of a substantial property right of the applicant;

(3) That the granting of the exception will not be detrimental to the public welfare or injurious to other property in the vicinity in which the property is situated, and that it will not:

(i) Be detrimental to the traffic circulation system, the public utility and storm drainage systems,

(ii) Result in any increase in the county's maintenance costs,

(iii) Be detrimental to, nor degrade, any portion of the improvement work involved in the project.

(d) The subdivision review board shall not recommend approval of an exception pursuant to subsection (c) of this section unless it makes positive findings on all of the criteria listed in that subsection.

(e) The subdivision review board shall not recommend approval of any adjustment request pursuant to subsection (b) unless it finds each of the following:

(1) Such adjustment is necessary for the preservation and enjoyment of substantial property rights of the applicant; and

(2) The granting of the adjustment will not have a material adverse effect upon the health or safety of persons residing or working in the neighborhood of the property; and

(3) The granting of such adjustment will not be materially detrimental to the public welfare or injurious to property or improvements in said neighborhood. (Ord. 2070 Section 7, 1981; Ord. 1986 Section 2(part), 1979).

22.01.044 - Variance: A variance from the strict application of the terms of this Title or from planning area standards of the Land Use Element that do not relate to parcel size, density or limitations on use may be requested as follows:

(a) Application. A written application for variance is to be filed with the Planning Department on the form provided, accompanied by all graphic information required for Plot Plans by Section 22.02.030b(1) through (7) (Plot Plan Content), and any additional information necessary to explain the request. Acceptance of the application is subject to Section 22.01.032a (Consistency with the Land Use Element Required), and 22.02.022 (Determination of Completion).

(b) Notice and Hearing. Following acceptance of a variance application and completion of a staff report, the Planning Commission will conduct a public hearing on the variance request. The notice and scheduling of the hearing is to be pursuant to Section 22.02.036 (Public Hearing).

(c) Action on a Variance. The Planning Commission shall approve, approve subject to conditions, or disapprove a variance as set forth in this subsection. Such decision may be appealed to the Board of Supervisors as set forth in Section 22.01.042 (Appeal).

(1) Findings. Approval or conditional approval shall be granted only when the Planning Commission first determines that the variance satisfies the criteria set forth in Government Code Section 65906 by finding that:

(i) The variance authorized does not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and land use category in which such property is situated; and

(ii) There are special circumstances applicable to the property, including size, shape, topography, location, or surroundings, and because of these circumstances, the strict application of this Title would deprive the property of privileges enjoyed by other property in the vicinity and in the same land use category; and

(iii) The variance does not authorize a use that is not otherwise authorized in the land use category; and

(iv) The granting of such application does not, under the circumstances and conditions applied in the particular case, adversely affect the health or safety of persons, is not materially detrimental to the public welfare, nor injurious to nearby property or improvements.

(2) Conditions of Approval. In approving an application for variance, such conditions shall be adopted as are deemed necessary to enable making the findings set forth in Section 22.01.044c(1).

22.08.012 - Standards For Special Uses: Standards in this chapter are related to the special characteristics of the uses discussed and unless otherwise noted apply to developments *in addition to* all other applicable standards of this Title, and all applicable planning area standards of the Land Use Element.

* * *

(c) Whenever this chapter requires Development Plan approval, or when the applicant requests processing of another application as a Development Plan, the standards of this chapter, except those relating to residential density or limitations on the duration of a use, may be waived or modified by the Planning Commission based upon findings of facts that:

(1) Set forth the necessity for modification or waiver of standards by identifying the specific conditions of the site and/or vicinity which make standard unnecessary or ineffective.

(2) Identify the specific standards of this chapter being waived or modified.

(d) In no case, however, shall any standard of this chapter be reduced through Development Plan approval pursuant to Subsection c beyond the minimum standards of the other chapters of this Title, except through variance (Section 22.01.044).

22.08.120 - Miscellaneous Special Uses (S-1 and S-2). A use of land that is not listed elsewhere in this chapter, and is designated by the Land Use Element as allowable pursuant to this section, is subject to the following permit requirements in addition to all applicable provisions of this Title:

(a) Uses Requiring Site Plan Review (S-2): Uses designated by the Land Use Element as allowable pursuant to this subsection (S-2 uses on Table O, Part I of the Land Use Element), require Site Plan review in accordance with Section 22.02.032 (Site Plan).

(b) Uses Requiring Development Plan Review (S-1): Uses designated by the Land Use Element as S-1 uses allowable pursuant to this subsection require Development Plan review in accordance with Section 22.02.034 (Development Plan).

APPENDIX C

EXCERPTS FROM PERTINENT CALIFORNIA STATUTES IN EFFECT IN 1980 — 1981

GOVERNMENT CODE (West 1983):

§ 51240. Authority to limit use.

Any city or county may by contract limit the use of agricultural land for the purpose of preserving such land pursuant and subject to the conditions set forth in the contract and in this chapter. A contract may provide for restrictions, terms, and conditions, including payments and fees, more restrictive than or in addition to those required by this chapter.

§ 51242. Land subject of contract.

No city or county may contract with respect to any land pursuant to this chapter unless the land:

(a) Is devoted to agricultural use.

(b) Is located within an area designated by a city or county as an agricultural preserve.

§ 51244. Term; renewal; notice.

Each contract shall be for an initial term of no less than 10 years. Each contract shall provide that on the anniversary date of the contract or such other annual date as specified by the contract a year shall be added automatically to the initial term unless notice of nonrenewal is given as provided in Section 51245.

§ 65302. Elements required to be included in plan.

The general plan shall consist of a statement of development policies and shall include a diagram or diagrams and text setting forth objectives, principles, standards, and plan proposals . . . .

§ 65361. Amendments of mandatory elements; application.

(a) Except as provided in subdivision (b), no mandatory element of a general plan shall be amended more frequently than three times during any calendar year, which amendment or amendments may occur at any time as determined by the legislative body.

§ 69906. Variances from zoning ordinances.

Variances from the terms of the zoning ordinances shall be granted only when, because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of the zoning ordinance deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

Any variance granted shall be subject to such conditions as will assure that the adjustment thereby authorized shall not constitute a grant of special privileges inconsistent with the limitations upon other properties in the vicinity and zone in which such property is situated.

A variance shall not be granted for a parcel of property which authorizes a use or activity which is not otherwise expressly authorized by the zone regulation governing the parcel of property. The provisions of this section shall not apply to conditional use permits.

§ 66474. Findings justifying disapproval.

A legislative body of a city or county shall deny approval of a tentative map, or a parcel map for which a tentative map was not required, if it makes any of the following findings:

(a) That the proposed map is not consistent with applicable general and specific plans as specified in Section 65451 . . . .

REVENUE AND TAXATION CODE (West 1987):

§ 423. Factors considered in valuation.

Except as provided in Section 423.7, when valuing enforceably restricted open-space land, other than land used for the production of timber for commercial purposes, the county assessor shall not consider sales data on lands, whether or not enforceably restricted, but shall value such lands by the capitalization of income method in the following manner:

(a) The annual income to be capitalized shall be determined as follows:

(1) Where sufficient rental information is available the income shall be the fair rent which can be imputed to the land being valued based upon rent actually received for the land by the owner and upon typical rentals received in the area for similar land in similar use, where the owner pays the property tax. Any cash rent or its equivalent considered in determining the fair rent of the land shall be the amount for which comparable lands have been rented, determined by average rents paid to owners as evidenced by typical land leases in the area, giving recognition to the terms and

conditions of the leases and the uses permitted within the leases and within the enforceable restrictions imposed.

(2) Where sufficient rental information is not available, the income shall be that which the land being valued reasonably can be expected to yield under prudent management and subject to applicable provisions under which the land is enforceably restricted. There shall be a rebuttable presumption that "prudent management" does not include use of the land for a recreational use, as defined in subdivision (n) of Section 51201 of the Government Code, unless the land is actually devoted to such use.

(3) Notwithstanding any other provision herein, if the parties to an instrument which enforceably restricts the land stipulate therein an amount which constitutes the minimum annual income per acre to be capitalized, then the income to be capitalized shall not be less than the amount so stipulated.

Supreme Court, U.S.
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No. 87-2104

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

LAKE NACIMIENTO RANCH CO.,
A California Limited Partnership,

Petitioner,

vs.

COUNTY OF SAN LUIS OBISPO, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

INTRODUCTION

Three important items stand out in the County's Opposition:

First. Either the County refuses to face the reality that the lower courts are experiencing great difficulty in understanding and applying this Court's concepts of "economically viable use," "reasonable, investment-backed, profit expectations," and "ripeness," or the County is satisfied to live with (and exploit) the confusion for its own gain.

Second. Instead of analyzing and discussing the decisions which the Ranch Co. described in its Petition as *causing* the confusion which has overwhelmed the lower courts, the County blandly — and without any analysis — *cites* those cases as authority for its position. But pretending that those cases provide an answer, rather than being

the problem, won't make the problem go away. Lower courts and litigants suffer with the confusion daily. Legal commentators figuratively rend their clothing.

Third. The County *pretends* to examine the factual basis of this litigation by purporting to "show" the existence of numerous "uses" for the subject property. However, all the County has done is to refer generally to its "laundry list" zoning ordinance of *theoretically* available uses (Opp., pp. 3, 10, 11, 17, 18 n. 21, 21, 22), without *any* analysis of how they apply to *this* property, and without *any* discussion of the evidence presented by the Ranch Co.'s expert witnesses, who testified without contradiction that *none* of those theoretically available uses could be economically developed on this property.[1]

Thus, while it has a scholarly gloss, the County's Opposition is of little aid to the Court in examining the issues at bench. Its argument by evasion and *ipse dixit* does not serve the Court.

THERE *IS* A NATIONWIDE PROBLEM IN DETERMINING WHAT REGULATORY ACTS DENY "ECONOMICALLY VIABLE USE"

The County has presented this Court with a fantasist's view of the law which is not shared by the scholarly community or active practitioners in land use litigation.

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[1] The impropriety of this mode of "analysis" was pointed out in a leading text:

> "Mere provision in the land use regulation for arguably beneficial and economically viable uses is insufficient to avoid a determination that the regulation effects a taking as applied to the property." (Shonkwiler & Morgan, *Land Use Litigation* [1986] §5.04 at 181)

Illustrative is the County's assertion about the ease of application of this Court's concept of "economically viable use." The County says:

> "The courts of appeal that have addressed the issue have applied a *consistent* analytical framework in determining whether economically viable use of property remains." (Opp., pp. 18-19; emphasis added.)

Really? *No one* accepts that simplistic view of the world.

Recent commentary is uniform in bemoaning the *lack* of what the County calls "a consistent analytical framework" for deciding the issue.[2] In the June 1988 Supplement to his nationally recognized treatise, Professor Norman Williams concluded simply:

> " 'An Economically Viable Use.' This phrase has occurred in several instances, but to date there has been *no serious attempt* to define it." (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 53; emphasis added.)

In a summary of comments collected in the *1988 Zoning and Planning Law Handbook* (Gordon, Ed., 1988), the following appear:

Quoting the National League of Cities:

> "The [U.S. Supreme Court] declared that governments can be sued for compensation for a taking, but said *nothing* about what kinds of actions or level of regulation will be considered a taking." (p. 14; emphasis added.)

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[2] As the Court will note, virtually all of the following commentary was generated within the last 6 months.

Quoting the General Counsel for the National Association of Counties:

> ". . . it is *not clear* what constitutes a taking . . ." (p. 14; emphasis added.)

Summarizing the Editor's views:

> ". . . this area of the law *has not been clarified* and the courts continue to generate *contradictory* opinions utilizing various aspects of the extant 'formulas,' none of which have garnered anything approaching a consensus in the view of bench, bar, and academe." (p. 342; emphasis added.)[3]

In the Spring 1988 issue of The Urban Lawyer, the Assistant Attorney General of Massachusetts concluded:

> "This virtually *standardless* inquiry has provided *little predictability* for property owners, nor has it served as a reliable guide for government action." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400; emphasis added.)

While all participants may not agree on *what the answer ought to be*, all (except the County in this case) agree that there *is* a serious problem and resolution of that problem by this Court would be in the National interest.

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[3] "If there are *no rules* specific enough to control future decisions, then every case is decided according to the *gastronomic school of jurisprudence* — that is, this is an area where government acts according to whim in the individual case, instead of government by rule of law." (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 25-26; emphasis added.)

THERE *IS* A NATIONWIDE PROBLEM IN DETERMINING THE MEANING AND APPLICATION OF "REASONABLE, INVESTMENT-BACKED PROFIT EXPECTATIONS"

The County's view of reasonable, investment-backed profit expectations is also fantasy. As the County puts it:

> "Petitioner's assertion (pp. 7-15) that there is confusion over the interpretation of 'reasonable investment-backed expectations' is simply incorrect." (Opp., p. 13)

But the County is wrong on this, as well. Others note the true, chaotic, situation:

> " 'Investment Backed Expectations.' This is another phrase which has recently been adopted and repeated widely. Again, it is *difficult to know what to make of it* . . . The state courts have struggled for a long time over the same question . . . Close analysis of these cases indicates that there is *no consensus* in the vast body of state law on this point; it is an area of almost *pure gut jurisprudence*." (1 Williams, *American Land Planning Law* [1988 Cum. Supp.] 54-55; emphasis added.)

> "Although [*Penn Central*] stated that investment-backed expectations are but one factor in the application of a taking clause that has no 'set formula,' they add *yet another complexity to the doctrinal muddle* of taking law." (Mandelker, *Investment-Backed Expectations: Is There a Taking?* [1987] 31 J. Urb. & Contemp. L. 3;

emphasis added.)[4]

> "In several cases since *Penn Central*, the Supreme Court has fleshed out its statement that one of the factors in deciding whether a governmental action violates the just compensation clause is 'the extent to which the regulation has interfered with distinct investment-backed expectations.' This *curious phrase* is *not easily understood or applied.*" (Peterson, *Land Use Regulatory "Takings" Revisited: The New Supreme Court Approaches* [1988] 39 Hast. L. J. 335, 345; emphasis added.)

As the commentators make clear, confusion in applying this Court's concept is rampant.

THERE *IS* A NATIONWIDE PROBLEM IN DETERMINING "RIPENESS," AND THIS CASE IS AN APPROPRIATE ONE IN WHICH TO PROVIDE SOME NEEDED ANSWERS

In unstated recognition of this Court's desire to bring rationality to land use litigation, and knowing (although it argues disingenuously to the contrary) that all observers are dissatisfied with the present, confused, state of the law, the County attempts to preserve its litigational victory by seeking to derail this Court from the issues by urging that the "facts" show a lack of "ripeness."

---

[4] "Justice Brennan did not indicate whether frustration of investment-backed expectations would be enough to find a taking. His inclusion of these expectations in a list of 'factors' suggests that frustration alone is not enough. *The Court has not yet resolved this question.*" (Mandelker, 31 J. Urb. & Contemp. L. at 4-5; emphasis added.)

The County's supposed "factual" decoys need not concern the Court. A few examples illustrate their illusory nature.[5]

First. The County repeatedly urges that this case is not "ripe" because the Ranch Co. never applied for a development permit. (Opp., pp. 6, 8, 9, 23)

The Ranch Co. agrees that it made no application. What the County refuses to face is the *reason*: the uncontradicted testimony showed that *no* use "permitted" by the County's ordinance could be developed in an economically viable manner.[6] If that doesn't show "futility" (compare Pet., pp. 23-27 with Opp., p. 10), then the word "futility"

---

[5] The County has also improperly embellished its Opposition with numerous "facts" which are *not* in the record, most of which are demonstrably false. For example, the County asserts that "waivers and variances are routinely granted." (Opp., p. 11) There is *no* evidence on this point. As discussed hereafter, the availability of variances is severely limited by both County and State law. Additionally, the County denigrates its planning staff memorandum (Pet., App E), asserting that it does *not* say that only 5 uses are even theoretically viable, and that it does not deal with *combinations* of uses. The document speaks for itself, in stating that "the County contends the following uses, or combinations of uses, *could* be economically viable . . ." (Pet., App E-1) Space limitation precludes setting all of the County's fact misstatements straight.

[6] The County's Opposition demonstrates the "game" quality which this rule has taken on. Recognizing that the Ranch Co.'s witnesses had shown that none of the theoretically permitted uses were economically viable, the County urged (and the lower courts agreed) that the Ranch Co. must then prove that no *combination* of such uses would be economically viable. (Opp., pp. 10, 21) The possible permutations are literally endless. There is no value to such game-playing. If viable uses existed, property owners would apply for them. There is no joy in continuous litigation.

has lost all meaning.[7] There is no point in applying for a use which, if granted, could not be developed because it would cost more to develop than could be recouped.

Second. The County urges that this case is not "ripe" because the Ranch Co. never applied for a variance. (Opp., pp. 10, 18 n. 21)

The Ranch Co. agrees that it made no variance application. What the County ignores is that:

- The supposed "variance" procedure would not have provided any relief, because its scope is severely restricted by County ordinance:
  "A variance from the strict application of the terms of this Title or from planning area standards of the Land Use Element *that do not relate to parcel size, density or limitations on use* may be requested as follows . . ." (Opp., App B 5; emphasis added.)
  The uncontradicted testimony showed that it was the *excepted* items (size, density, and use limitation) which made development not economically viable.[8]
- The Ranch Co. satisfied the intent behind this Court's "variance" requirement by applying for a zone change for 800 acres to a use category which *would* permit economically viable use.

---

[7] "The lower federal court attempts to *wrestle* with the meaning of 'futility' have led to a *bewildering* set of judicial statements." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation*, 11 Zoning & Planning Law Report [July-Aug 1988] 49, 53; emphasis added.)

[8] Moreover, as the County knows (see Opp., p. 9), California law *prohibits* granting a variance to change the *use* of land established by the General Plan. (*Herrington v. County of Sonoma* [9th Cir 1987] 834 F 2d 1488, 1496)

> The County denied that application, making it clear that it wanted *no* use made.

The problem is not with the facts of this case, but with the vague and confused state of "ripeness" law. As a more detached government lawyer expressed it, "[l]ike the vagueness of the three-factor analysis [for determining what is a taking], this requirement [*i.e.*, 'ripeness'] has historically worked to the advantage of government regulators." (Lawrence, *Regulatory Takings: Beyond the Balancing Test* [1988] 20 The Urban Lawyer 389, 400 fn. 71) The County's satisfaction with the uncertainty of the "ripeness" test is, thus, understandable: uncertainty, which translates into rigidity in the Ninth Circuit, benefits the County in litigation against its citizens. That makes it neither Constitutional nor right.

Since the Petition was filed, this Court decided *Felder v. Casey* (1988) ___ US ___, 56 USLW 4689. The analysis in *Felder* seems at odds with the strictness of the "ripeness" requirement in land use cases. While property owners are required to seek specific relief from the very agencies which are denying their rights, this Court denigrated such requirements in other types of litigation over Constitutional rights:

> "Given the evil at which the federal civil rights legislation was aimed, there is *simply no reason* to suppose that Congress . . . contemplated that those who sought to vindicate their federal rights in state courts could be required *to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries.*" (56 USLW at 4694; emphasis added.)

This case is "ripe." On the record below, summary judgment was improper. This Court can confidently focus its attention on providing guidance to lower courts, government agencies, and property owners on the proper scope and application of the "ripeness" test. As two noted

commentators concluded in the most recent (July-August 1988) discussion of the issue:

> "The 'finality' requirement has been the *most troublesome* for the lower federal courts *to apply*. Some judges have openly admitted their *difficulty* in determining 'when enough is enough' under this requirement. [Citations.]
>
> "The Court of Appeals for the *Ninth Circuit* has had the most opportunities to refine this first prong of the ripeness doctrine. But its *decisions have not yet yielded any predictable approach* for plaintiff property owners." (Mandelker & Blaesser, *Applying the Ripeness Doctrine in Federal Land Use Litigation* 11 Zoning & Planning Law Report [July-Aug. 1988] 49, 53; emphasis added.)

CONCLUSION

The County's Opposition refuses to deal with reality. It seeks to hide behind a fictional conclusion that everything is just fine with land use law. The experts quoted in this brief and in the Petition (exasperated commentators and courts alike) demonstrate the contrary.

The Nation needs this Court's guidance. This case presents an appropriate opportunity to provide it.

The Ranch Co. prays that Certiorari be granted.

Respectfully submitted,

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